TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 92

OTHO G. BELL, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 17, 1960
CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

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INDEX

	Original	Print
Proceedings in the United States Court of Claims		
Petition	1	1
Defendant's answer and counterclaim	5	4
Plaintiff's reply to counterclaim	11	7
Stipulation of facts	13	8
Stipulation of damages if plaintiffs, or any of them, are entitled to recover as matter of law	30	19
Exhibit "9" to Commissioner's report—Receipt and promise to repay funds advanced as financial assistance loans for subsistence and repatriation	33	20
Plaintiffs' requested findings of fact	36	24
Plaintiffs' objections to defendant's proposed findings of fact	41	26
Plaintiffs' exceptions to commissioner's report	44	28
Minute entry of argument and submission (omitted in printing)	46	29
Order re claims and denial thereof	47	29
Letter dated November 8, 1955 from Harold C. Brown and George T. Davis to Chief of Finance, Department of the Army	48	30

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 19, 1960

	Original	Print
Proceedings in the United States Court of Claims—Continued		
Letter dated October 2, 1956 from H. W. Crandall to Harold C. Brown	49	31
Opinion, Jones, C.J.	51	33
Dissenting opinion, Madden, J.	60	44
Findings of fact	63	46
Conclusion of law	75	59
Clerk's certificate (omitted in printing)	76	59
Order allowing certiorari	77	59

	Original	Print
Exhibit "6" to Commissioner's report—Computation of pay and allowances re William A. Cowart	78	60
Exhibit "7" to Commissioner's report—Computation of pay and allowances re Lewie W. Griggs	79	61
Exhibit "8" to Commissioner's report—Computation of pay and allowances re Otho G. Bell	80	62

[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

Docket No. 547-56

OTHO G. BELL (1), WILLIAM A. COWART (2), LEWIE W. GRIGGS (3), Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, Defendant.

PETITION—Filed December 31, 1956

To the Honorable, The United States Court of Claims:

Otho G. Bell, William A. Cowart and Lewie W. Griggs, plaintiffs herein, respectfully show unto the court and allege as follows:

I.

That plaintiffs are citizens of the United States.

II.

That plaintiff, Otho G. Bell, enlisted in the United States Army on January 29, 1949; that plaintiff, William A. Cowart, enlisted in the United States Army on January 7, 1949; that plaintiff, Lewie W. Griggs, enlisted in the [fol. 2] United States Army on August 4, 1949.

III.

That plaintiff, Otho G. Bell, was captured in combat by enemy forces in Korea on November 30, 1950; that plaintiff, William A. Cowart, was captured in combat by enemy forces in Korea on July 12, 1950; that plaintiff, Lewie W. Griggs, was captured by enemy forces in Korea on April 25, 1951.

IV.

That all of the plaintiffs were dishonorably discharged from the United States Army on January 23, 1954.

V.

That each of the plaintiffs was a corporal in the United States Army from the time of his capture until the time of his discharge.

VI.

That none of the plaintiffs received any pay or allowances as members of the United States Army from the time of his capture until the time of his discharge.

VII.

That the claim and demand of each of the plaintiffs for his pay and allowances as a member of the United States Army from the time of his capture until the time of his discharge was presented to the Department of the Army for payment. That on the 2nd day of October, 1956, each of the plaintiffs' claims for payment was denied in writing [fol. 3] by the Department of the Army.

VIII.

That no action is now pending or has ever been undertaken on plaintiffs' claims by Congress, or by any department of the defendant, or in any judicial proceedings, other than as stated above.

IX.

That these claims are made and based upon:

1. Section 232 of Title 37 of the U.S.C. (Oct. 12, 1949, c 681, Title II, section 201, 63 Stat. 805; May 19, 1952, c 310, section 1 (2), 66 Stat. 79);

2. Section 237 of Title 37 of the U.S.C. (Oct. 12, 1949, c 681, Title II, section 206, 63 Stat. 811);

3. Executive Order No. 10168 (Oct. 11, 1950, 15 F.R. 6877);

4. And other acts of Congress and Executive Orders relative to payment of the Armed Forces.

X.

That plaintiff, Otho G. Bell, claims pay and allowances from November 30, 1950, until January 23, 1954, as a corporal in the United States Army, serving outside the continental limits of the United States, amounting to $4,580.71, more or less; that plaintiff William A. Cowart, claims pay and allowances from July 12, 1950, until January 23, 1954, as a corporal in the United States Army, serving outside the continental limits of the United States, amounting to $5,057.18, more or less; that plaintiff, Lewie [fol. 4] W. Griggs, claims pay and allowances from April 25, 1951, until January 23, 1954, as a corporal in the United States Army, serving outside the continental limits of the United States, amounting to $4,071.12, more or less.

XI.

That each of the plaintiffs is and always has been the sole owner of his claim herein stated; that none of the plaintiffs has ever assigned or transferred his said claim.

XII.

That plaintiffs believe the facts as they are herein stated to be true.

XIII.

That plaintiffs are justly entitled to recover the amounts herein claimed.

Wherefore, plaintiff, Otho G. Bell, prays judgment against the United States of America for the sum of $4,580.71, with interest as provided by law; plaintiff, William A. Cowart, prays judgment against the United States of America for the sum of $5,057.18, with interest as provided by law; plaintiff Lewie W. Griggs, prays judgment against the United States of America for the sum of $4,071.12, with interest as provided by law.

Dated, Castro Valley, California, December 20, 1956.

Robert E. Hannon, Attorney for Plaintiffs.

[fol. 5]

IN THE UNITED STATES COURT OF CLAIMS

No. 547-56

[Title omitted]

DEFENDANT'S ANSWER AND COUNTERCLAIM—
Filed August 30, 1957

For its answer to plaintiffs' petition, defendant admits, denies and alleges as follows:

1. The allegations contained in paragraph I constitute conclusions of law, but insofar as they may be deemed to be allegations of material fact, they are denied.

2. Admits the allegations of paragraph II.

3. Admits the allegations of paragraph III.

4. Admits the allegations of paragraph IV.

5. Denies the allegation of paragraph V that each of the plaintiffs was a Corporal in the United States Army at the time of his capture and alleges that at such time each of the plaintiffs was a Private First Class. Denies the balance of the allegations of said paragraph concern-
[fol. 6] ing the status of plaintiffs as Corporals during their captivity, but admits that during said period, the Department of the Army, without knowing of plaintiffs' activities, took routine administrative action to reflect a change in plaintiffs' records to the grade of Corporal as of May 1, 1953.

6. Admits the allegations contained in paragraph VI, except that, defendant advanced on behalf of plaintiff Bell, for insurance (Class N Allotment) and for dependents (Class E and Q Allotments), the sum of $6,182.50, and advanced on behalf of plaintiff Griggs, for insurance and for dependents (Class N and E Allotments), the sum of $1,898.24.

7. Admits the allegations contained in paragraph VII.

8. Defendant's attorney lacks knowledge or information sufficient to form a belief as to the allegations contained

in paragraph VIII, and defendant therefore denies the same.

9. Alleges that the allegations contained in paragraph IX constitute conclusions of law and that defendant is not called upon to answer the same, but that insofar as they may be deemed to constitute allegations of fact, defendant denies the same.

10. Denies the allegations contained in paragraph X.

11. Defendant lacks knowledge or information sufficient to form a belief as to the allegations contained in paragraph XI, and therefore denies the same.

12. Denies the allegations contained in paragraph XII.

13. Denies the allegations contained in paragraph XIII.

[fol. 7] 14. Denies all allegations in plaintiffs' petition not heretofore admitted or qualified.

First Affirmative Defense

15. Plaintiffs were among twenty-one prisoners of war who had served in the Army in Korea, were captured, and in August 1953 refused to be repatriated and returned to United States control when they were released from prison. Instead, plaintiffs elected to remain with the Communists and in a communist country. Because plaintiffs refused repatriation when they were released from prison as prisoners of war, and because plaintiffs continued in their election until January 23, 1954, they were on that date dishonorably discharged from the Army.

16. Between the time of plaintiffs' capture and the time of their dishonorable discharges, each plaintiff adhered to, worked for and collaborated with the enemy of the United States and was therefore guilty of a breach of his contract of enlistment and of his oath of enlistment for faithful service. Therefore, each plaintiff abandoned his status as a soldier in the United States army and forfeited all pay and allowances to which he might otherwise have been entitled under his enlistment contract.

Second Affirmative Defense

17. During the period for which they seek to recover pay and allowances herein, plaintiffs advocated the overthrow of the Government of the United States or were members of a political party or organization which so ad- [fol. 8] vocated. Therefore, plaintiffs are not entitled to recover under the provisions of Section 9A of the Act of August 2, 1939 (53 Stat. 1148), as amended (5 USC 118j), and the Appropriation Acts applicable to the periods for which they seek to recover pay and allowances (Section 609, National Military Establishment Appropriation Act of 1950; 63 Stat. 1018 and subsequent Defense Appropriation Acts).

Counterclaim Against Otho G. Bell

18. Defendant advanced on behalf of plaintiff Bell for insurance (Class N Allotment) and dependents (Class E and Q Allotments), the sum of $6,182.50.

19. Plaintiff Bell has not repaid said $6,182.50 or any part thereof.

20. Plaintiff Bell owes defendant $6,182.50 by reason of the foregoing advance.

Counterclaim Against William A. Cowart

21. Defendant advanced plaintiff Cowart for his expenses to return to the United States the sum of $355.00.

22. Plaintiff Cowart has not repaid said $355.00 or any part thereof.

23. Plaintiff Cowart owes defendant $355.00 by reason of the foregoing advance.

Counterclaim Against Lewie W. Griggs

24. Defendant advanced on behalf of plaintiff Griggs for insurance and dependents (Class N and E Allotments) the sum of $1,898.24.

25. Plaintiff Griggs has not repaid said $1,898.24 or any part thereof.

[fol. 9] 26. Plaintiff owes defendant $1,898.24 by reason of the foregoing advance.

Wherefore, defendant demands that plaintiffs' petition be dismissed and that defendant have judgment against plaintiffs on the counterclaims herein for the sum of $6,182.50, with interest, against plaintiff Bell, $355.00, with interest, against plaintiff Cowart and $1,898.24, with interest, against plaintiff Griggs.

George Cochran Doub, Assistant Attorney General, Civil Division.

Francis X. Daly, Attorney, Civil Division, Department of Justice.

[fol. 11]

IN THE UNITED STATES COURT OF CLAIMS

No. 547-56

[Title omitted]

PLAINTIFF'S REPLY TO COUNTERCLAIM—
Filed September 25, 1957

For reply to defendant's counterclaim, plaintiffs admit, deny and allege as follows:

I

Plaintiff's attorney lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs 18 through 25 of defendant's answer, and placing his denial on that ground, denies generally and specifically each and every, all and singular, the allegations contained in said paragraphs.

Wherefore, plaintiffs pray that defendant take nothing by its counterclaim and that plaintiffs have judgment against the defendant as asked in the complaint.

Robert E. Hannon, Attorney for Plaintiffs.

[fol. 13]

IN THE UNITED STATES COURT OF CLAIMS

No. 547-56

[Title omitted]

STIPULATION OF FACTS—Filed January 21, 1959

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the facts hereinafter set forth shall, for the purposes of this case, be deemed to have been elicited from defendant's witnesses testifying under oath. The facts so elicited, and hereinafter set forth, have not been rebutted by plaintiffs or by plaintiffs' witnesses, and plaintiffs, and each of them, hereby waive the right to testify or to call witnesses to testify in rebuttal of these facts. Defendant reserves the right to offer additional evidence either by way of testimony or exhibits, and plaintiffs, and each of them, reserve the right to offer rebuttal evidence, either by way of testimony or exhibits, to rebut any such additional evidence, if any, offered by defendant. Plaintiffs, and each of them, also reserve the right to object to the materiality and relevancy of any of the agreed facts hereinafter set forth.

[fol. 14] Re: *Otho G. Bell*

1. Plaintiff Bell enlisted in the United States Army on January 29, 1949. On November 30, 1950, he was captured with other United States soldiers by the Chinese Communist forces in Korea. At the time of his capture he was a Private First Class. Upon capture he was confined in Prisoner of War Camp #5 located at Pyoktong, North Korea.

2. Plaintiff Bell voluntarily served as a monitor in required squad study group meetings organized by the Chinese, beginning about January 1, 1951. As squad monitor, he procured Communist propaganda literature from the enemy, distributed said writings among the squad members, and instructed them to read and discuss this literature. He threatened to turn in the names of any prisoners of war [fol. 15] who refused to read or discuss favorably these

Communist propaganda hand-outs. In these forced attendance study group meetings he also lectured and led the discussions favorable to the Communist cause and condemnatory of the United States, *e.g.*, stating that the United States engaged in germ warfare, that the United States had caused the Korean war, that American forces had committed atrocities, that there were many more advantages about Communism than about democracy. He voluntarily attended the special Voluntary Study Group maintained by the Chinese to indoctrinate the so-called Progressives. He voluntarily joined the Peace Committee, whose members espoused Communism through public address system broadcasts, and through distribution of propaganda articles and petitions.

3. Plaintiff Bell made tape recordings which were then broadcast over the Peiping radio and over the prison camp's public address system. He stated that the Chinese treatment of the prisoners of war was good; requested that his parents and relatives write President Truman to end the war and withdraw the Seventh Fleet from Formosa; said that the Korean war was senseless; avowed that on the orders of his platoon leader, his men killed North Korean prisoners of war; vilified President Truman as a warmonger; averred that life was better in China than in the United States; declared the American political parties were led by imperialists.

4. Plaintiff Bell participated in numerous Communist propaganda activities. He wrote articles which appeared in the camp newspaper, *Towards Truth And Peace*, and in magazines entitled, *People's China*, and *China Monthly Review*. In these articles plaintiff alleged that American troops had committed atrocities against North Korean civilians and enemy soldiers and that he personally had been [fol. 16] ordered to kill women and children and not to take prisoners; he ridiculed the American Army; he praised the good treatment accorded the prisoners of war by the Chinese; he wrote that the United States was unjustified in sending troops to Korea, and that he wanted to go to China to fight for peace and did not want to return to America; he urged the prisoners of war to vow to fight for world peace

on their return to the United States; he accused President Truman of forcing the United States into war and if given the opportunity he would run a tank over the President's body. Plaintiff Bell was paid money to write these articles. With the money he was paid to write these articles, he purchased candy and cigarettes in the Chinese post-exchange in Pyoktong.

5. Plaintiff Bell was a member of the so-called "Wall Paper Committee" whose duties were to hang enemy propaganda articles, pictures, cartoons and slogans on the camp bulletin board. He delivered lectures before his company and to the camp upon American aggression, and belittled America's economic and educational systems. He wrote letters to the United Nations in which he declared that American troops had committed atrocities against enemy civilians and soldiers, and that prisoners of war were receiving good treatment from their captors.

6. Plaintiff Bell drew cartoons and posters depicting American atrocities and use of germ warfare, which were pinned upon the camp bulletin boards and printed in the above-named publications. He drew up and signed peace petitions addressed to President Truman, the United Nations, to relatives of prisoners of war, and to peace organizations, *e.g.*, Stockholm Peace Appeal, the Vienna Peace [fol. 17] Conference, and the Asia and Pacific Peace Conference. Further, the Chinese made motion pictures of plaintiff as he signed the petition addressed to the Asia and Pacific Peace Conference. He led a group of so-called Progressives in camp carrying banners depicting President Truman as a clown and slogans reading "Down with capitalists". Plaintiff Bell appeared in bi-monthly plays—one entitled "Golden Boy" depicting poverty and racial discrimination in the United States, and the other which he wrote was entitled "The Highest Stage of Capitalism" concerning the overthrow of the United States. He appeared voluntarily in a Chinese motion picture in which he portrayed an American rifleman captured by the Communists. The motion picture depicted atrocities committed by American soldiers and the low morale of the American forces. He also signed surrender leaflets. He attempted to and/or

persuaded other prisoners of war to join the Voluntary Study Group and the Peace Committee. He also tried to and/or persuaded other POWs to sign petitions, to follow and accept Communistic theories, and to make recordings.

7. Plaintiff Bell made the following statements—that for every good point about the American Government, there were three good things about Communism; that the South Koreans started the war and that it was like the Civil War in the United States; that American troops were tools and hatchet-men of American imperialists; that the United States and the United Nations had no right to be in the war; that the United States engaged in germ warfare; that if he were given a weapon he would fight against the United States and that he had attempted to join the Chinese Army but had been refused; that he would return from China in five years and would teach Communism and help fight for Communism; that the working people are slaves and can- [fol. 18] non fodder for the capitalists; that he was not going to return to the United States and planned to renounce his citizenship and stay in China to fight for the peoples' side.

8. Plaintiff Bell wore the Chinese uniform, plus the Peace Dove medal (given by the Chinese to show that the wearer was in sympathy with Communism) and the Mao Tse Tsung medal (given by the Chinese to so-called Progressives) to identify them as Communists and to reward them for their achievements and learning in Communistic ideology. He consorted with the Chinese. He attended enemy parties held in Pyoktong. He visited the Chinese company and regimental headquarters in the prison camp frequently, in the day and at night. He took walks and talked with Chinese officers, inside and outside the camp. He was accorded special privileges by the Chinese, *e.g.*, more and better food and drink, better medical treatment, freedom of the camp, lighter work details.

9. As squad leader in Camp #5, he sold food intended for the sick to other POWs at $5.00 a bowl. As monitor of the forced study group, he had food rations for some men cut down because they would not favorably discuss Com-

munism, and threatened to turn in the names of men who did not study the Communistic literature. He informed on other POWs. As monitor of the forced study group, he would inform the Chinese if a squad member refused to read required propaganda literature, or failed to voice a [fol. 19] pro-Communist opinion in the discussion periods. He told the Chinese that a certain POW was planning to escape and, as a result, the POW was placed in solitary confinement. He told the Chinese that he and others in his outfit had killed Chinese POWs and this falsification caused the Chinese to attempt to pressurize another POW into writing a story about these atrocities. He told the Chinese that the 2d Infantry Division massacred South Korean civilians. A United States POW was interrogated as a result of plaintiff's written statement to the Chinese that American troops herded Communist POWs on a ship and injected poison gas into their blood, that the American Air Force bombed women and children, and that he saw an American lieutenant and enlisted men rape a Korean woman.

10. Plaintiff Bell turned in names to the Chinese of POWs whom he had ordered to obtain their rations, but who had been too ill to obey. He reported a POW who had refused to fall out for exercise, who was therefore sentenced to 15 days at hard labor with his rations cut to one meal a day. He informed on POWs who stole wood from the Chinese. He also informed the Chinese that POWs had stolen food for which acts they were put into solitary confinement. As a result of plaintiff's relation to the Chinese, a POW had a fight with another POW and one of them was placed in solitary. Because he reported to the Chinese that certain POWs had criticized him, those POWs were made to stand outdoors in the sun all day and were sentenced to hard labor. He reported to the Chinese the name of a POW who planned to escape, and the latter was placed in "the hole" where he died. Because he gave the names to the Chinese of POWs who participated in a sit-down strike, one of the men was bayonetted and the rest were placed in soli- [fol. 20] tary. A POW was forced to stand in an icy river because plaintiff told the Chinese that the former had "talked back" to him.

11. The Korean armistice was signed July 27, 1953, and prisoner repatriation began August 5, 1953, at Panmunjon. Plaintiff Bell refused repatriation and voluntarily elected to go to Communist China. After going to Communist China, he attended the Ideological Reformation School in Taiyuan, China, where Communist ideology was taught, for seven months. He was assigned to a machine center on a collective farm in the Yellow River Valley, China, where he worked until his return to the United States. On January 23, 1954, plaintiff Bell was dishonorably discharged from the United States Army. He returned to the United States in July 1955.

Re: *William A. Cowart*

1. Plaintiff Cowart enlisted in the United States Army on January 7, 1949. On July 12, 1950, he was captured in combat by North Korean forces in Korea with other United States soldiers. At the time of his capture, he was a Private First Class. He refused to help carry wounded United States soldiers as the POWs were being marched away from the point of capture near Chochiwon, Korea.

2. Plaintiff Cowart stole food from other POWs in the North Korean prison camps. He visited the headquarters of the North Korean forces frequently, and conversed with Korean officers and Russian civilians there. He told the North Korean captors that two fellow POWs had beaten him for stealing their food. He informed a North Korean colonel that the POWs had disobeyed orders by giving prisoners too ill to work full rations rather than half ra- [fol. 21] tions. He informed North Korean captors that a POW had stolen foodstuffs and that a POW was planning to escape. He signed a petition calling on the United Nations forces to lay down their arms. He received extra tobacco rations from the North Korean guards and was given light work details.

3. Subsequent to October 19, 1951, plaintiff Cowart was transferred to Chinese Prisoner of War Camp #3. He was a monitor of the forced study group there, and was a member of the Voluntary Study Group attended by all so-called Progressives for the purpose of Communistic indoctrina-

tion. He influenced or attempted to influence other POWs to join the Voluntary Study Group and to believe in the Communistic dogma. He made tape recordings which were later broadcast over Peiping radio and over the camp public address system. He therein broadcast about the good treatment accorded to POWs by the Chinese. He urged that America end the war and the American Government be petitioned to end the war. He declared that the Korean war was useless, that American soldiers were being cheated by the capitalists and war-mongers of Wall Street, and that America should cooperate with the Chinese.

4. Plaintiff Cowart was a member of the Peace Committee which drew up, signed and circulated peace petitions. He wrote propaganda articles which appeared in *Towards Truth And Peace* and in the *China Monthy Review*. He wrote that American soldiers committed atrocities, that Americans used germ warfare, that the Chinese had a better educational system than the United States in that in America only the wealthy could obtain an education, that the United States used germ warfare, that the American people had been misled and that the United States was [fol. 22] waging an aggressive war. He reviewed the Communist books he had read. He drew propaganda posters and cartoons, depicting capitalists living off the masses, Uncle Sam hanging from a tree or lying in a coffin with the words written "For Peace and Against American Aggression" and "Down With War Mongers", depicting Uncle Sam carrying a bomb, and Uncle Sam on his knees before a Chinese soldier armed with a bayonet.

5. Plaintiff Cowart acted in several camp plays. One play mocked the various United Nations. Other plays depicted that the use of a germ warfare bomb and the use of an atomic bomb benefited capitalists, that civilians were being coerced to join the American Army. In another play, he portrayed an American POW who was being treated well by the Chinese while other American soldiers were stupidly fighting in foxholes. Another play satirized President Truman and General Ridgeway, at the end of which the actors, including Cowart said "Down With the United States".

6. Plaintiff Cowart wore a Chinese uniform, the Peace Dove Medal and the Stalin Badge. He informed on POW infractions or actions, for which they were later punished. He reported to the Chinese that POWs had stolen food from the Chinese warehouse, that certain POWs made anti-communist remarks, that he (Cowart) had been beaten by POWs, that certain POWs were either not studying the propaganda given to them or were not giving the correct answers in the forced study group meetings, that a POW was planning to escape, that certain POWs had torn up slogans and pictures in the Progressives' Study Club Room.

7. Plaintiff Cowart consorted with the Chinese running the prisoner of war camps, attended Chinese parties, walked [fol. 23] and talked with Chinese officers, guards and interpreters, and lived for some time at the Chinese regimental headquarters. He was given special privileges, *e.g.*, better rations, quarters, no work details, and was allowed to make purchases at the Chinese post-exchange in Pyong-yang.

8. Plaintiff Cowart stated that he believed in Communism; that any thinking person would adopt Communism, that he hated America; that its Government should be overthrown; that he desired to study in China and return to the United States in five years to help in the overthrow of the Government, which was inevitable; that the American Government was fascistic, similar to the German Government. He wrote a letter to Mao Tse Tsung in which he stated his belief in Communism, criticized the American economic and educational systems, asked for the opportunity to study in China and join the Communist party, and gave thanks for the kind treatment accorded him by the Chinese.

9. The Korean armistice was signed July 27, 1953, and prisoner repatriation began August 5, 1953, at Panmunjon. Plaintiff Cowart refused repatriation and voluntarily elected to go to Communist China. After going to Communist China he voluntarily attended a Communist indoctrination school at Taiyuan, China, where Communist ideology was taught, for seven months. On January 23, 1954, plaintiff Cowart was dishonorably discharged from

the United States Army. In July 1955, he returned to the United States.

Re: *Lewie W. Griggs*

1. Plaintiff Griggs enlisted in the United States Army on August 4, 1949. On April 25, 1951, he was captured with other United States soldiers by the Chinese Communist forces in Korea. At the time of his capture, he was a Private [fol. 24] First Class. Upon capture, he was confined in Prisoner of War Camp 1.

2. Plaintiff Griggs was a monitor in the forced study group meetings in the prisoner of war camp wherein he led the discussions after he had lectured on Communism. He was also a member of the Voluntary Study Group which he attended regularly with other so-called Progressives. He was a member of the Peace Committee which drew up, signed and circulated peace petitions. He attempted to influence and persuade POWs to join the Voluntary Study Group and Peace Committee, to sign petitions, and to follow Communistic doctrines. He wore a "Peace Dove" Medal, and also wore a black arm band at Stalin's death. As a member of the Permanent Peace Committee he wore a cloth inscribed with Chinese writing on his chest.

3. Plaintiff Griggs was a member of a Kangaroo Court invoking punishments on POWs for infractors. He appeared as a witness against a POW and signed his name to the charges. A POW, after being released from a cellar by the Chinese, was returned to the cellar at the suggestion of the Peace Committee on which plaintiff Griggs served. He recommended to the Chinese various punishments to be meted out to POWs for breaking rules, while other squad members stated that nothing should be done. He informed on POWs. He revealed names to the Chinese of POWs who led a mass exodus from a Communist entertainment show. He disclosed to the Chinese the name of a POW who had planned to escape. As monitor, he disclosed the names of those who criticized Communism or refused to study Communistic literature, and revealed the names of POWs who had stolen food and tobacco from the Chinese warehouse.

[fol. 25] 4. Plaintiff Griggs made recordings for the Chinese radio, which were also sent out over the camp public address system. Round table discussions of the so-called Progressives, in which plaintiff participated, were recorded and broadcast. He spoke over the camp public address system. The subjects of these recordings and broadcasts were, that atrocities had been committed by American troops; that the American Government should be overthrown; that the Korean war was the fault of the United States. One of the recordings, which was directed to plaintiff's mother and played back over the public address system, requested that his mother join organizations for peace and persuade President Truman to withdraw troops from Korea. As a member of the Peace Committee, he drew up, signed and circulated peace petitions which urged the cessation of war and the use of bombs and germ warfare by the United States. He signed surrender leaflets and letters addressed to his friends which were dropped behind United Nations lines. These letters and leaflets urged surrender and described the good treatment provided by the Chinese.

5. Plaintiff Griggs wrote propaganda articles to which he signed his own name or unauthorizedly signed the name of another POW. These articles were published in *Towards Truth and Peace* and in other camp publications. In these articles he urged that the United States should cease fighting; declared that the United States used germ warfare and committed atrocities; and stated that the Chinese were good friends. He delivered speeches to groups of POWs to the effect that he and a committee had read confessions of American Air Force officers as to the use of bacteriological warfare and that he (Griggs) believed the confessions. He wrote letters to various groups and individuals in the United States urging them to write to the Government re- [fol. 26] questing peace. He uttered pro-Communist and anti-American statements, *e.g.*, that the United States was the aggressor, a war-monger; that American capitalists in control of the Government started the Korean war; that if he were given a weapon he would fight the United Nations' forces; that the United States used germ warfare; that the study of Communism was beginning to make sense to him;

that he believed in Communism; that the Chinese were right in embracing Communism; that when he returned to the United States it would be Communistic and he would be a hero; that the whole world would be dominated by Communism in ten years and that individuals similar to him would be leaders; that he would join the Communist party when he returned to the United States; that he would sell out the United States for a tailor-made cigarette.

6. Plaintiff Griggs consorted with the Chinese in the prisoner of war camp, attended enemy parties, visited Chinese headquarters frequently, walked and talked with enemy officers and interpreters, and called or referred to the Chinese as "comrades". He was accorded special privileges in that he received better food, drink, medical treatment, had freedom of the camp and did not have to go out on work details.

7. The Korean armistice was signed July 27, 1953, and prisoner repatriation began August 5, 1953, at Panmunjon. Plaintiff refused repatriation and voluntarily elected to go to Communist China. He signed letters prepared by the Chinese addressed to the families of Edward Dickenson and Claude Dickenson. In these letters plaintiff declared the imprisonment of these two men was unjust. He attended a Communist indoctrination school at Taiyuan, China, for [fol. 27] six months. He was assigned to a state farm in the Yellow River Valley, China, and later was transferred to a factory at Kaifeng until his return to the United States. On January 23, 1954, plaintiff Griggs was dishonorably discharged from the United States Army. He returned to the United States in July 1955. On his return he stated that he returned to the United States because China was a slave state and because having a job, going to school, taking vacations and having a family and hobbies were practically out of reach in China.

General

1. At the time of his capture, each plaintiff was a Private First Class in the Army of the United States. After each plaintiff was captured and before each plaintiff refused

repatriation and elected to go to Communist China, the Department of the Army took routine administrative action to reflect a change in each plaintiff's records to show them as Corporals as of May 1, 1953.

2. Plaintiffs have received no pay for the period from the date each was captured to January 23, 1954, the date each was dishonorably discharged, except amounts advanced by the Army for insurance and allotments for the dependents of each plaintiff. The amounts so advanced are shown on the Army's pay records of each plaintiff. The trial of this case is to be limited to the issues of law and fact relating to the right of each plaintiff to recover, under Rule 38(c). If any plaintiff is, or if all plaintiffs are, entitled to recover in this action, the amount or amounts, subject to offsets, will be determined by the General Accounting Office, in conjunction with the Army, or by further proceedings, if the [fol. 28] Court so orders. If plaintiffs, or any one of them, are not entitled to recover in this action, and if defendant is entitled to recover on its counterclaim, the amount to be recovered by defendant on its counterclaim will be determined by the General Accounting Office, in conjunction with the Army, or by further proceedings, if the Court so orders.

Robert E. Hannon, Attorney for Plaintiffs.

George Cochran Doub, Assistant Attorney General, Civil Division; Francis X. Daly, Sheldon J Wolfe, Attorneys, Civil Division, Department of Justice.

[fol. 29] [File endorsement omitted]

[fol. 30]

IN THE UNITED STATES COURT OF CLAIMS

No. 547-56

[Title omitted]

STIPULATION OF DAMAGES IF PLAINTIFFS, OR ANY OF THEM, ARE ENTITLED TO RECOVER AS MATTER OF LAW

1. This case has been tried on the merits and proof has been closed.

2. The Honorable C. Murray Bernhardt, the Commissioner of this Court, who heard this case, has advised both parties that he will reopen proof momentarily for the purpose of receiving a stipulation as to damages (should the Court as matter of law decide that plaintiffs, or any of them, are entitled to recover) if the parties can reach agreement as to the amount of possible damages.

3. It is hereby agreed by and between the parties hereto, by their respective attorneys, that, if this Court decides that the plaintiffs, or any of them are entitled to recover as matter of law the net amount damage suffered by each plaintiff by reason of the allegations in the petition is as follows:

[fol. 31]

Otho G. Bell	$1,455.29
William A. Cowart	4,991.13
Lewie W. Griggs	2,810.14

Robert E. Hannon, Attorney for Plaintiffs.

George Cochran Doub, Assistant Attorney General, Civil Division; Francis X. Daly, Attorney, Civil Division, Department of Justice.

[fol. 33]

EXHIBIT "9" TO COMMISSIONER'S REPORT

[Stamp—Original]

[Handwritten notation—Z-166290 4 mlt]

RECEIPT AND PROMISE TO REPAY FUNDS ADVANCED AS FINANCIAL ASSISTANCE LOANS FOR SUBSISTENCE AND REPATRIATION

Hong Kong, B.C.C., July 11, 1955

I, William A. Cowart, have today received from the American Consulate General, Hong Kong, B.C.C., the sum of $359.79 United States currency which I promise to repay without interest to the Treasurer of the United States upon demand, in legal tender of the United States.

That sum includes $4.79 for my subsistence for the period from July 10, 1955 to July 11, 1955 at the rate of $ ——— monthly and $355.00 for my repatriation. It also includes amounts for the dependent American members of my family or for extraordinary expenses in detail as follows:

———

———

———

———

[Stamp—Jan 3 1957; Initialed—BB]

I understand that my obligation to repay the sum herein stated will not be discharged until the Treasurer of the United States actually receives in legal tender of the United States full repayment of that sum.

I further understand and agree that after my repatriation I will not be furnished a passport for travel abroad until my obligation to reimburse the Treasurer of the United States is liquidated.

/s/ WILLIAM A. COWART
William A. Cowart

Local address:

Prince Hotel, 377 Prince Edward Road, Kowloon, Hong Kong.

Address in the United States:

401 West McCloy St., Montecello, Arkansas.

Witness: /s/ S. M. BACKE
S. M. Backe
American Consul
American Consulate General
Hong Kong

[Stamp—Received—Dec 5—1956—GAO Claims Division]

to Commissioner's Report

(See Opposite)

EMERGENCY LOAN RECORD

Send statements to:

401 West McClay St
Montevallo
Alabama

Account of COWART, William A.

PREVIOUS BALANCE	AUTH. NO.	DATE	CODE	REF. NO.	DESCRIPTION	DEBIT	CREDIT	BALANCE
		Aug 22-55	705	59	SUBSISTENCE & TRANSPORTATION 7-11-55	359.79		359.79

32977 BILLINGS	32977 BILLINGS
1st 8-22-55	5th for 8-22-56 2nd note
2nd 11-15-55	6th
3rd 1-24-56	7th
4th 4-11-56 note	

2

[fol. 35] [File endorsement omitted]

[fol. 36]

IN THE UNITED STATES COURT OF CLAIMS

PLAINTIFFS' REQUESTED FINDINGS OF FACT—
Filed July 9, 1959

The above entitled cause came on for hearing on the 4th day of May, 1959, before the Honorable C. Murray Bernhardt, Commissioner, United States Court of Claims, in the City Council Chambers Few Memorial Hall of Records, Pacific and Madison Streets, Monterey, California, Robert E. Hannon appearing as Counsel for plaintiffs and Francis X. Daly appearing as Counsel for the defendant, and the Commissioner having heard the testimony and having examined the proofs offered by the respective parties, and the evidence in the case having been closed, the plaintiff now requests that the following facts be found, to wit:

1. That the plaintiffs Otho G. Bell, William A. Cowart, and Lewie W. Griggs were citizens of the United States at the time of their respective enlistments in the United States Army. (R. 2)

[fol. 37] 2. That the plaintiffs, Otho G. Bell, William A. Cowart, and Lewie W. Griggs are now and at all times since the date of their respective enlistments in the United States Army have been citizens of the United States.

3. That the plaintiff, Otho G. Bell, enlisted in the United States Army on January 29, 1949 (Stipulation of Facts P-1).

4. That the plaintiff, William A. Cowart, enlisted in the United States Army on January 7, 1949 (Stipulation of Facts P-7).

5. That the plaintiff, Lewie W. Griggs, enlisted in the United States Army on August 4, 1949 (Stipulation of Facts P-10).

6. That the plaintiff Otho G. Bell was captured by the Chinese communist forces in Korea on November 30, 1950. (Stipulation of Facts P-1A).

7. That the plaintiff William A. Cowart was captured by the North Korean forces in Korea on July 12, 1950. (Stipulation of Facts P-7).

8. That the plaintiff Lewie W. Griggs was captured by the Chinese communist forces in Korea on April 25, 1951. Stipulation of Facts P-10.

9. That the plaintiff Otho G. Bell was a Private First Class in the United States Army at the time of his capture. (Stipulation of Facts P-1A).

[fol. 38] 10. That the plaintiff William A. Cowart was a Private First Class in the United States Army at the time of his capture. (Stipulation of Facts P-7).

11. That the plaintiff Lewie W. Griggs was a Private First Class in the United States Army at the time of his capture. (Stipulation of Facts P-10-11).

12. That on May 1, 1953 each of the plaintiffs was promoted to the rank of Corporal in the United States Army. (Stipulation of Facts P-14).

13. That the plaintiff Otho G. Bell was dishonorably discharged from the United States Army on January 23, 1954. (Stipulation of Facts P-7).

14. That the plaintiff William A. Cowart was dishonorably discharged from the United States Army on January 23, 1954. (Stipulation of Facts P-10).

15. That the plaintiff Lewie W. Griggs was dishonorably discharged from the United States Army on January 23, 1954. (Stipulation of Facts P-14).

16. That each of the plaintiffs was confined as a prisoner of war from the date of his capture until the date of his dishonorable discharge.

17. That none of the plaintiffs have received any pay for the period from the date each was captured to January 23, 1954, the date each was dishonorably discharged, except amounts advanced by the Army for insurance and allotments for the dependents of each plaintiff. (Stipulation of Facts P-14).

[fol. 39] 18. That each of the plaintiffs was a member of the United States Army from the date of his enlistment to the date of his Dishonorable Discharge.

19. That the net amount of pay due to the plaintiff, Otho G. Bell, from the defendant is the sum of One Thousand Four Hundred Fifty-five Dollars and Twenty-nine Cents ($1,455.29) (Stipulation of Damages if Plaintiffs, or any of them, are Entitled to Recover as Matter of Law).

20. That the net amount of pay due to the plaintiff, William A. Cowart, from the defendant is the sum of Four Thousand Nine Hundred and Ninety-one Dollars and Thirteen Cents ($4,991.13) (Stipulation of Damages if Plaintiffs, or any of them, are Entitled to Recover as Matter of Law).

21. That the net amount of pay due to the plaintiff, Lewie W. Griggs, from the defendant is the sum of Two Thousand Eight Hundred Ten Dollars and Fourteen Cents ($2,810.14) (Stipulation of Damages if Plaintiffs, or any of them, are Entitled to Recover as Matter of Law).

Respectfully submitted,

Robert E. Hannon, Attorney for Plaintiffs.

[fol. 40] [File endorsement omitted]

[fol. 41]

IN THE UNITED STATES COURT OF CLAIMS

PLAINTIFFS' OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT—Filed August 7, 1959

The plaintiffs having read and considered the defendant's proposed findings of fact filed in the above entitled matter hereby object to the following portions of the said defendant's proposed findings of fact.

1. As to that portion of the defendant's proposed findings of fact which relate to the plaintiff Bell, the plaintiffs object to paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, with the exception of that sentence in paragraph 11 on page 7 of said findings, which reads, "On January 23, 1954, plaintiff Bell was dishonorably discharged from the United

States Army.", to which sentence the plaintiffs do not object.

2. As to that portion of the defendant's proposed findings of fact relating to the plaintiff Cowart, the plaintiffs object to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9, with the exception of that portion of paragraph 1, commencing on [fol. 42] page 7 of said proposed findings which reads, "Plaintiff Cowart enlisted in the United States Army on January 7, 1949. On July 12, 1950 he was captured in combat by North Korean forces in Korea with other United States soldiers. At the time of his capture he was a Pvt. First Class.", to which portion the plaintiffs do not object, and except that portion of paragraph 9 on page 11 of said proposed findings which reads, "On January 23, 1954 plaintiff Cowart was dishonorably discharged from the United States Army.", to which sentence the plaintiffs do not object.

3. As to that portion of the plaintiffs' proposed findings of fact relating to the plaintiff Griggs, the plaintiffs object to paragraphs 2, 3, 4, 5, 6 and 7 of said proposed findings with the exception of that portion of paragraph 7 on page 15 of said findings which reads, "On January 23, 1954, plaintiff Griggs was dishonorably discharged from the United States Army.", to which sentence the plaintiffs do not object.

4. As to that portion of the plaintiffs' proposed findings of fact which is entitled, "General", the plaintiffs object to paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, with the exception of that portion of paragraph 18 on page 21 of said proposed findings which reads, "At the time of his capture, each plaintiff was a Pvt. First Class in the Army of the United States. After [fol. 43] each plaintiff was captured . . . the department of the Army took routine administrative action to reflect a change in each plaintiff's records to show them as Corporals as of May 1, 1953.", to which portions the plaintiffs do not object.

5. The plaintiffs' objection to each and all of the above objected-to-facts is made and based upon the grounds that

each and all of such objected-to-facts are immaterial and irrelevant to the issues involved in this case.

White vs. United States (1931) 72 Court of Claims 459

Respectfully submitted,

Robert E. Hannon, Attorney for Plaintiffs.

[fol. 44]

IN THE UNITED STATES COURT OF CLAIMS

No. 547-56

OTHO G. BELL (1), WILLIAM A. COWART (2), LEWIE W. GRIGGS (3), Plaintiffs,

vs.

THE UNITED STATES, Defendant.

PLAINTIFFS' EXCEPTIONS TO COMMISSIONER'S REPORT

The plaintiffs having read and considered the report of the commissioner filed in the above entitled matter hereby except to the following portion of said report.

1. Plaintiffs except to paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 31, 32 and 33.

2. Plaintiffs except to all of paragraph 16 with the exception of that portion of said paragraph which reads, "On January 23, 1954, plaintiff Bell was dishonorably discharged from the United States Army. He returned to the United States in July, 1955.", to which sentence the plaintiffs do not object.

[fol. 45] 3. Plaintiffs except to all of paragraph 24 with the exception of that portion of paragraph 24 which reads, "On January 23, 1954, plaintiff Cowart was dishonorably discharged from the United States Army. In July, 1955, he returned to the United States.", to which portion the plaintiffs do not except.

4. The plaintiffs except to all of paragraph 30 with the exception of that portion of paragraph 30 which reads, "On January 23, 1954, plaintiff Griggs was dishonorably discharged from the United States Army. He returned to the United States in July, 1955.", to which portion of said paragraph the plaintiffs do not except.

5. The plaintiffs except to that portion of the first sentence of paragraph 34 which reads, "and before each plaintiff refused repatriation and elected to go to Communist China,". Plaintiffs do not except to the remainder of paragraph 34.

6. The plaintiffs' exception to each and all of the above excepted to facts is made and based upon the grounds that each and all of such excepted to facts are immaterial and irrelevant to the issues involved in this case.

Respectfully submitted,

Robert E. Hannon, Attorney for Plaintiffs.

[fol. 46] Minute Entry of Argument and Submission—January 20, 1960 (omitted in printing).

[fol. 47]

In the United States Court of Claims

No. 547-56

Otho G. Bell, et al.

v.

The United States.

Order Re Claims and Denial Thereof—January 25, 1960

This case comes before the court for the purpose set out below on its own motion pursuant to Rule 27 (28 U.S.C. 2507).

It appearing in paragraph 7 of the petition that the plaintiffs made claims and demands upon the Army for the subject pay and allowances which claims and demands were denied in writing by the Department of the Army on October 2, 1956.

It Is Therefore Ordered this twenty-fifth day of January, 1960, that the Department of the Army be and the same is requested to file with the Clerk of this court within 10 days hereof copies of the above referred to claims and demands, together with a copy or copies of the Department of the Army's denial thereof.

By the Court

Marvin Jones, Chief Judge.

[fol. 47A] [File endorsement omitted]

[fol. 48]

HAROLD C. BROWN
SAN FRANCISCO 5

YUkon 6-3676

November 8, 1955

Chief of Finance
Department of the Army
Washington, D. C.

Dear Sir:

Re: Otho G. Bell	Serial No.	RA 18276618
Lewie W. Griggs	Serial No.	RA 18322825
William A. Cowart	Serial No.	RA 14313076

Enclosed herewith please find letter directed to the Controller General of the United States, which is self-explanatory. We see no reason why this matter should be forwarded to the Controller General and why you should not forthwith pay the three above named men, who have now been discharged from custody by the United States Army, all of their back-pay, prisoner of war allowances.

These men have requested that these drafts be forwarded to this office so that we may distribute the same to them. There have been many expenses incurred during our representation of these men and they desire us to see that all bills are paid.

Very truly yours,

HAROLD C. BROWN AND GEORGE T. DAVIS

SIGNED

By .....

We authorize and direct you to follow the instructions as set forth above.

WILLIAM A. COWART SIGNED
LEWIE W. GRIGGS SIGNED
OTHO G. BELL SIGNED

TRUE COPY

[fol. 48A] [File endorsement omitted]

[fol. 49]

HEADQUARTERS
DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF FINANCE
Washington 25, D. C.

FINEM 330.3 (14 Sep 56) General 2 October 1956

Mr. Harold C. Brown
Attorney at Law
605 Market Street
San Francisco 5, California

Dear Mr. Brown:

Further reference is made to your inquiries concerning the claims of Otho G. Bell, Lewie W. Griggs, and William A. Cowart.

I have been advised that the following determinations have been made regarding the status of all United States

Army Voluntary Non-Repatriates who elected not to accept repatriation to United States control under the terms of the Korean Armistice Agreement prior to 23 January 1954:

a. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954, under the terms of the Korean Armistice Agreement have, as demonstrated by their refusal to elect repatriation to the United States and their records as prisoners of war, adopted, adhered to or supported the aims of Communism, one of which is the overthrow of all non-Communist governments, including the Government of the United States, by force or violence.

b. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954 under the terms of the Korean Armistice Agreement now advocate, or are members of an organization which advocates, the overthrow of the United States Government by force or violence.

c. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954 under the terms of the Korean Armistice Agreement advocated, or were members of an organization which advocated, during the period from the date of their capture in Korea through the date of their Dishonorable Discharge from the Army, the overthrow of the United States Government by force or violence.

d. That such persons are not entitled to the payment of salary or wages for the period beginning with their respective dates of capture through the date they were given Dishonorable Discharges.

[fol. 50] The claims of Otho G. Bell, Lewie W. Griggs, and William A. Cowart may not, therefore, be favorably considered.

Sincerely yours,

SIGNED

H. W. CRANDALL
Major General, USA
Chief of Finance

TRUE COPY

[fol. 51]

IN THE UNITED STATES COURT OF CLAIMS

No. 547-56

(Decided March 2, 1960)

OTHO G. BELL (1), WILLIAM A. COWART (2), LEWIE W. GRIGGS (3),

v.

THE UNITED STATES.

Mr. Robert E. Hannon, for the plaintiffs.

Mr. Francis X. Daly, with whom was Mr. Assistant Attorney General George Cochran Doub, for the defendant. Mr. Sheldon J. Wolfe was on the brief.

OPINION—March 2, 1960

JONES, *Chief Judge*, delivered the opinion of the court:

The plaintiffs sue for pay and allowances which they claim to be due them as prisoners of war from the dates of capture in 1950 and 1951 until their discharge from the Army on January 23, 1954.

They had enlisted in the United States Army at different dates in 1949. At the time of their capture they were privates, first class.

The applicable statutes are set out in the footnote.[1] The plaintiffs claim that from the date of their capture until

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[1] 50 U.S.C. App. § 1002 (1952) provides as follows:

"Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered or besieged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled thereafter, and entitlement to pay and allowances shall terminate upon the date of receipt by the department con-

[fol. 52] their actual discharge they were entitled under the statutes to the regular pay and allowances of soldiers of their classification.

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cerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]: *Provided*, That such entitlement to pay and allowances shall not terminate upon expiration of term of service during absence and in case of death during absence shall not terminate earlier than the dates herein prescribed: *Provided further*, That there shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period."

50 U.S.C. App. § 1006 (1952) provides as follows:

"When it is officially reported by the head of the department concerned that a person missing under the conditions specified in section 2 of this Act [section 1002 of this Appendix] is alive and in the hands of a hostile force or is interned in a foreign country, the payments authorized by section 3 of this Act [section 1003 of this Appendix] are, subject to the provisions of section 2 of this Act [section 1002 of this Appendix], authorized to be made for a period not to extend beyond the date of the receipt by the head of the department concerned of evidence that the missing person is dead or has returned to the controllable jurisdiction of the department concerned. When a person missing or missing in action is continued in a missing status under section 5 of this Act [section 1005 of this Appendix], such person shall continue to be entitled to have pay and allowances credited as provided in section 2 of this Act [section 1002 of this Appendix] and payments of allotments, as provided in section 3 of this Act [section 1003 of this Appendix], are authorized to be continued, increased, or initiated."

50 U.S.C. App. § 1009 (1952) provides as follows:

"The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001–1012 and 1013–1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. The determination of the head of the department concerned, or of such subordinate as he may designate, shall be conclusive as to whether information

The defendant alleges in the pleadings and it is not denied by the plaintiffs that they were among prisoners who were captured; that these three refused to be repatriated and return to the United States when they were released from prison; that instead they chose to remain

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received concerning any person is to be construed and acted upon as an official report of death. When any information deemed to establish conclusively the death of any person is received in the department concerned, action shall be taken thereon as an official report of death, notwithstanding any prior action relating to death or other status of such person. If the twelve months' absence prescribed in section 5 of this Act [section 1005 of this Appendix] has expired, a finding of death shall be made whenever information received, or a lapse of time without information, shall be deemed to establish a reasonable presumption that any person in a missing or other status is no longer alive. Payment or settlement of an account made pursuant to a report, determination, or finding of death shall not be recovered or reopened by reason of a subsequent report or determination which fixes a date of death except that an account shall be reopened and settled upon the basis of any date of death so fixed which is later than that used as a basis for prior settlement. Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act [sections 1001–1012 and 1013–1016 of this Appendix], to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: *Provided*, That no such account shall be charged or debited with any amount that any person in the hands of a hostile force may receive or be entitled to receive from, or have placed to his credit by, such hostile force as pay, wages, allowances, or other compensation: *Provided further*, That where the account of any person has been charged or debited with allotments paid pursuant to this Act [said sections] any amount so charged or debited shall be recredited to such person's account in any case in which it is determined by the head of the department concerned, or such subordinate as he may designate, that payment of such amount was induced by fraud or misrepresentation to which such person was not a party. When circumstances warrant reconsideration of any determination authorized to be made by this Act [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. Excepting allotments for unearned insurance premiums, any allotments paid from pay and allowances of any person for the period of the person's entitlement under the provisions of section 2 of this Act [section 1002 of this Appendix] to receive or have credited

[fol. 53] with the Communists and in a communist country; that between the time of the plaintiffs' capture and the time of their dishonorable discharge each plaintiff adhered to, worked for, and collaborated with the enemy of the United States; that since they refused repatriation when they were released from prison and since they continued in their election until January 23, 1954, they were on that date dishonorably discharged from the Army.

[fol. 54] These allegations are nowhere disputed.

The defendant asserts that because of these admitted facts the plaintiffs were guilty of a breach of the contracts

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such pay and allowances shall not be subject to collection from the allottee as overpayments when payment thereof has been occasioned by delay in receipt of evidence of death, and any allotment payments for periods subsequent to the termination, under this Act [sections 1001–1012 and 1013–1016 of this Appendix] or otherwise, of entitlement to pay and allowances, the payment of which has been occasioned by delay in receipt of evidence of death, shall not be subject to collection from the allottee or charged against the pay of the deceased person. The head of the department concerned, or such subordinate as he may designate, may waive the recovery of erroneous payments or overpayments of allotments to dependents when recovery is deemed to be against equity and good conscience. In the settlement of the accounts of any disbursing officer credit shall be allowed for any erroneous payment or overpayment made by him in carrying out the provisions of this Act [sections 1001–1012 and 1013–1016 of this Appendix], except sections 13, 16, 17, and 18 [sections 1013 and 1016, and former sections 1017, 1018 of this Appendix], in the absence of fraud or criminality on the part of the disbursing officer involved, and no recovery shall be made from any officer or employee authorizing any payment under such provisions in the absence of fraud or criminality on his part."

10 U.S.C. § 846 (1952) provides as follows:

"Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled, while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law. (R.S. § 1288.)"

of enlistment and of their oaths of faithful service; and that therefore each plaintiff abandoned his status as a soldier in the United States Army and forfeited all pay and allowances to which he might have been entitled otherwise.

The undisputed testimony shows that during the period of their confinement each of the three plaintiffs became monitors for the "forced study groups," the sessions of which the prisoners were compelled to attend. Armed guards attended these sessions. The programs included lectures picturing what were declared to be the bad aspects of life in the United States as contrasted with idyllic life under communism. As monitors, they procured and distributed propaganda literature, and threatened to turn in names of any prisoners who refused to read and discuss favorably these propaganda handouts.

Each of the plaintiffs made tape recordings which were used as broadcasts and over the camp public address system. Each of them wore Chinese uniforms and were permitted to attend meetings outside the camp. The details of the plaintiffs' consorting, fraternizing and cooperating with their captors and the devious ways in which they sought favors for themselves, thus causing hardship and suffering to the other prisoners, are set out in our findings 7 to 30, inclusive.

Two of Bell's recordings were broadcast over the Peiping radio, stating among other things that on the orders of his platoon leader, his men had killed North Korean prisoners of war, and that President Truman was a war monger. In written articles for the camp newspaper he alleged that American troops had committed atrocities and he personally had been ordered to kill women and children and not to take prisoners of war, and that if given the opportunity he would run a tank over the President's body.

Bell was paid money to write these articles. He also delivered lectures before his company and to the camp on American aggression. He appeared voluntarily in a motion picture and appeared in bi-monthly plays. He stated that if given a weapon he would fight against the United States. [fol. 55] He sold food intended for the sick to other prisoners of war. By making reports to the Chinese, he caused

one man to be bayonetted and others to be placed in solitary confinement.

Cowart did many similar things, wrote propaganda articles accusing American soldiers of atrocities and of using germ warfare. He drew posters and cartoons for the enemy, acted in plays, walked and talked with the Chinese officers, guards and interpreters, lived part of the time at Chinese regimental headquarters, stated he hated America, desired to study in China and to return to the United States in five years to help in the overthrow of the government.

Griggs did many similar things, attended enemy parties, visited Chinese headquarters frequently, referred to the Chinese as comrades, was accorded special privileges, made broadcasts, signed leaflets, wrote articles accusing the American soldiers of atrocities and declared the United States had used germ warfare.

These and many other acts of perfidy are abundantly proved by the record and are nowhere denied either in the pleadings or in the evidence. The record does not disclose any suggestion whatever of brainwashing. As a matter of fact, the record justifies the conclusion that at all times these men did these acts voluntarily for the purpose of helping themselves, in complete disregard of the effect it might have on the treatment of their fellow prisoners. The record does not indicate a touch of loyalty either to their compatriots or to their country after the period they were taken prisoners of war.

The defendant produced at the trials as witnesses certain Army staff officers who testified authoritatively that the United States did not authorize the use of germ warfare in Korea, did not ship any materials or equipment to Korea for that purpose, and received no requests for such materials or equipment. Rather than have this testimony remain in the record as evidence, the plaintiffs' counsel stipulated that neither the United States nor any of the United Nations forces engaged in germ warfare in Korea. In view of this stipulation and concession, the commissioner sustained plaintiffs' objection to this part of defendant's testimony but permitted it to remain in the record as defendant's offer of proof under Rule 41(c).

[fol. 56] In reference to plaintiff Bell's statement, as shown in finding 14, that the American troops had injected poison gas into the blood of communist prisoners of war on a ship, plaintiffs' counsel stipulated at the trial that this had not been done.

After the Korean armistice, which was signed July 27, 1953, and prisoner repatriation had begun on August 5, 1953, each of the plaintiffs refused repatriation and voluntarily elected to go to Communist China. After the plaintiffs were discharged on January 23, 1954, they filed this suit for their pay during the period indicated.

R.S. 1288, 10 U.S.C. § 846, *supra*, was enacted in 1814. Numerous statutes have been enacted and committee reports made since that time. These latter statutes, including sections 1002, 1006, and 1009, *supra*, of the legislation entitled the Missing Persons Act, as amended, cover the cases here presented. In fact, not only the language of the acts themselves, but the committee reports at the time these sections were enacted clearly show that but for this Missing Persons Act there would be no basis of a claim for compensation.[2]

It will be noted that section 1002, as quoted in the footnote, states in effect that any person determined to be "interned in a foreign country, captured by a hostile force, beleaguered or besieged shall, for the period he is officially carried or determined to be in any *such status*, be entitled" to pay and allowances. (Emphasis supplied.) Section 1006 states in effect that when it is officially reported that a person missing under the conditions specified is alive and *in the hands of a hostile force or is interned in a foreign country* he shall be paid.

Section 1009, which is a part of the same Act, states that "the head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act, and for the purposes of this Act determinations so made shall be conclusive as to death or finding of death, as to

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[2] See committee report, U.S. Cong. & Adm. News, 83d Cong., 1st Sess., 1953, p. 1344.

any other status dealt with by this Act . . . Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of [fol. 57] entitlement of any person, under provisions of this Act, to pay and allowances . . . When circumstances warrant reconsideration of any determination authorized to be made of this Act the head of the department concerned, or such subordinate as he may designate, *may change or modify a previous determination.*" (Emphasis supplied.)

This modification in the language of the law completely changes the original act, which was unconditional. These changes in the original act leave not the slightest doubt that it was the intention of the Congress to authorize the head of the department or his agent to determine not only the status but the entitlement to pay.

It is inconceivable that the plaintiffs should be paid in the circumstances disclosed by the undisputed facts in this record. The fact is that essentially they were not confined. They were permitted to go outside the camp, were given practical freedom and in the essence of things they were no longer in the status of prisoners.

The Department, in denying plaintiffs' claims, which were filed with the Department for pay, necessarily determined under the provisions and authority of the statute just quoted that during the period involved these plaintiffs did not have a status as prisoners, and were not entitled to pay under the quoted statutes. It was determined under the provisions of section 1009, quoted above, that they were not entitled to their pay. Such a finding was implicit in a determination that they should not be paid for the period following capture. This determination is fully supported by the record made here.[3]

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[3] The Army in denying payment of plaintiffs' claims stated in part as follows:

"I have been advised that the following determinations have been made, regarding the status of all United States Army Voluntary Non-Repatriates who elected not to accept repatriation to United States control under the terms of the Korean Armistice Agreement prior to 23 January 1954:

"a. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954, under the terms of the

It is almost incredible that these men would ask for pay in light of the conduct disclosed by the record.

[fol. 58] In arriving at the intent of the Congress, it is necessary to construe all the provisions of the law together even if sometimes it seems not to be in strict accord with certain specific provisions when they are lifted from the body of the law and read out of context. *Luna* v. *United States*, 124 C. Cls. 52 (1952); *Olney* v. *United States*, 123 C. Cls. 285 (1952); *United States* v. *Kirby*, 74 U.S. 482 (1868); and *Heydenfeldt* v. *Daney Gold etc. Co.*, 93 U.S. 634 (1876), from which we quote, at page 638, the following:

> It is true that there are words of present grant in this law; but, in construing it, *we are not to look at any single phrase in it, but to its whole scope*, in order to arrive at the intention of the makers of it. . . . If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment. (Emphasis supplied.)

The *Kirby* case involved an indictment of a sheriff and his posse under a statute which prohibited a willful obstruction of the United States mails. The sheriff had arrested a mail carrier who had been indicted for murder. In holding the statute not applicable, the Supreme Court, at page 487, made the following statement:

> The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, "that whoever drew blood in the streets should be punished with the utmost severity," did not extend

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Korean Armistice Agreement have, as demonstrated by their refusal to elect repatriation to the United States and their records as prisoners of war, adopted, adhered to or supported the aims of Communism, one of which is the overthrow of all non-Communist governments, including the Government of the United States, by force or violence."

to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt." And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.

[fol. 59] The defendant urges numerous defenses, including the claim that the statute which provided for pay "during captivity" is inapplicable because the plaintiffs were not really in captivity.

The Army regulations promulgated under the Missing Persons Act and in force at the time provide that the determination of the head of the Department, or his designated subordinate, as to status and as to entitlement to pay and allowances under this Act shall be conclusive. A.R. 35–1325, dated July 15, 1953.

We held in the case of *Moreno* v. *United States*, 118 C. Cls. 30 (1950), that under the provisions of section 1009, *supra*, of the Missing Persons Act, the Department head was authorized to conclusively determine both the status and entitlement to pay under the Act.

To adopt the construction for which plaintiffs contend would lead the entire purpose of the law into an absurdity.

The plaintiffs admit that they gave aid and comfort to the enemy. The pleadings and stipulations establish that fact. They made it far more difficult for their compatriots who were there with them. They made tape recordings to be used for encouraging the enemy and for discouraging the people of their own country. One of them took pay for these admitted acts. The others were paid in various privileges and advantages. Who can say that these broadcasts and other acts did not cause loss of life in the struggle?

Certainly it added to the hardships and suffering of their compatriots. The proof of these acts is overwhelming in the record. They were denied neither in the pleadings nor in the evidence.

For the purposes of a suit for civilian pay these facts are abundantly proven. For penalty or punishment purposes a trial by a court martial or for treason is perhaps necessary, but this is a civil court in which plaintiffs must establish their rights to affirmatively recover. In the face of these admitted facts the showing of a right to recovery fails. Neither the light of reason nor the logic of analysis of the undisputed facts of record can possibly justify the granting of a judgment favorable to these plaintiffs.

[fol. 60] Plaintiffs start up a difficult mountain to a summit of sheer legalism. Somewhere amid the mists and clouds along the way the spirit of the law completely disappears and its broken body lies in an unmarked spot under an avalanche of technical snow.

I cannot believe that any law can be as cold and lifeless as that. The law has for its primary purpose the ends of justice; otherwise it is as useless as a child trying to grasp a handful of sunlight. The law is a living thing, is not an end in itself but a means to an end. If it fails in this one thing it fails in everything.

To allow recovery in these cases would be to put a premium on dishonor and a penalty on courageous loyalty. We do not see how this court, or any court, can construe the law in such a fashion.

During the period involved here the defendant made certain payments for insurance and dependents. These were made largely for the benefit of the dependents of these soldiers and were not paid directly to the soldiers. The dependents in this record are not shown to have had any part in the actions of these unfortunate soldiers during the period involved here and are not parties to this suit. We do not believe that the ends of justice would be served by granting a judgment for the Government on its counterclaims.

The plaintiffs' petition and the defendant's counterclaims are dismissed in each of the cases.

It is so ordered.

LARAMORE, *Judge*, and WHITAKER, *Judge*, concur.

MADDEN, *Judge*, dissenting:

The statutes upon which the plaintiffs found their claims are 50 U.S.C. Appendix (1952 ed.) § 1002 and 10 U.S.C. (1952 ed.) § 846. The former statute says:

> Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered or besieged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence . . .

[fol. 61] The second statute cited above is to the same effect.

The plaintiffs, soldiers in the Korean War, were captured by North Korean or Chinese communist forces, two of them in 1950 and the third in 1951, and were prisoners until August 5, 1953, at which time the repatriation of prisoners following the Armistice began. The plaintiffs refused repatriation to the United States and elected to go to communist China. All three were dishonorably discharged from the Army on January 23, 1954. All three returned to the United States in July, 1955.

The plaintiffs have not been paid for the periods between the dates of their capture by the enemy and the date of their release from prison. They sue for that pay and point to the statutes. The statutes seem to say that they are entitled to their pay.

The Government says the statute should not be read as entitling them to their pay because the Army and this court have found as a fact that their conduct, while prisoners of war, was traitorous and contemptible.

No sophisticated person needs be told that there is much that a court can do with the literal language of a statute in order to avoid an absurd result or to produce a just result or one consistent with an important policy. But the judicial

rewriting of statutes ought to be indulged in with reluctance, and only when it is reasonably certain that the process will not do more harm than good, will not confuse the law rather than enlighten it.

The court, by adopting the Government's argument, has in effect placed in the disbursing officers of the Government the function of amending the statutes fixing the pay of military or civilian personnel on a *quantum meruit* basis. Both the military and civilian branches of Government service have their quotas of dead wood, and their quotas of persons of extraordinary value to the Government. Presumably, the paymasters may not pay the latter persons more than the statutes permit, but under today's decision it would seem that they may pay the former persons only what they are worth, which would be well below the statutory scale.

It will be said, of course, and truthfully said, that the conduct of the plaintiffs as prisoners of war was indecent [fol. 62] and reprehensible. The Government says that they must not be "rewarded" for such conduct by getting the pay which the statutes provide for prisoners of war. There has never been a war in which some prisoners have not acted contemptibly, in comparison with the conduct of their better balanced comrades. In modern warfare, with its subtle brainwashing techniques, one of the perils to badly balanced youths is the peril of being taken prisoner, of being persuaded to disloyal conduct, and of coming out of prison with their lives irreparably ruined. The amounts of pay here sued for by these plaintiffs would be a fabulous reward, indeed, for the tragic thing that happened to them in prison.

The statutes provide for the trial and punishment of soldiers for misconduct. If these men had been subjected to trial by a court-martial, or by a civilian court, the court would have considered their age, their upbringing, their mental qualities, the nature of the pressures to which they were exposed, and would have rendered an appropriate judgment. The judgment would not have included forfeiture of accrued pay. The Uniform Code of Military Justice, effective May 5, 1950, 64 Stat. 126, 50 U.S.C. § 638, provides that no forfeiture of pay and allowances shall extend to any

pay or allowances accrued before the date when a court martial sentence is approved by the convening authority.

It is noteworthy that after Congress abolished the historical power of courts-martial to forfeit accrued pay, the Army, apparently for the first time in history, forfeited the pay already accrued to these plaintiffs, not by the process of trial and sentence, which was forbidden by statute, but by the crude and primitive method of refusing to give them their money. Finding nothing in the law books to justify its refusal to pay these men, it threw the books away and just refused to pay them. It could have set before these confused young men a better example of government by law.

Congress has never been willing to venture into the field of distinguishing, in its pay schedules between good soldiers and bad soldiers, or between bad soldiers and soldiers so bad that they are beneath contempt. I venture to predict that it will never do so, because the task would be impossible.

The plaintiffs have incurred the just condemnation of [fol. 63] public opinion. The courts have nothing to do with that judgment. In court they are entitled to judgment according to law. I think that, according to law, they are entitled to their pay.

Findings of Fact

The court, having considered the evidence, the report of Trial Commissioner C. Murray Bernhardt, and the briefs and argument of counsel, makes findings of fact as follows:

1. The plaintiffs, Otho G. Bell, William A. Cowart, and Lewie W. Griggs, were citizens of the United States at the time of their enlistments in the United States Army, and there is no evidence that their status as such has changed.

2. The plaintiffs, Bell, Cowart, and Griggs, enlisted in the United States Army on the respective dates of January 29, 1949, January 7, 1949, and August 4, 1949.

3. The plaintiffs, Bell, Cowart, and Griggs, were captured by the North Korean and/or Chinese communist forces in Korea, along with other United States soldiers, on

the respective dates of November 30, 1950, July 12, 1950, and April 25, 1951.

4. At the times of their capture as aforesaid the plaintiffs were privates first class in the United States Army.

5. Upon their capture as aforesaid the plaintiffs Bell and Griggs, were detained, respectively, in Prisoner of War Camp No. 5 located at Pyoktong, North Korea, and in Prisoner of War Camp No. 1. The record does not disclose the place of detention of the plaintiff Cowart.

Activities of Plaintiffs During Detention

6. The parties by their attorneys entered into a stipulation of record by the terms of which, for the purposes of this proceeding, certain facts were to be deemed to have been elicited from defendant's witnesses testifying under oath, without the necessity of calling such witnesses to trial. The plaintiffs did not rebut the facts so elicited and waived the right to testify or to call witnesses to testify in rebuttal of the said facts, although the plaintiffs did reserve the right to object to the materiality and relevancy of any of the facts. The facts so set forth in the stipulation related to the activities of the plaintiffs while they [fol. 64] were detained as prisoners of war, and (as slightly modified) are provided in detail as to each plaintiff in succeeding findings 7 through 30.

Otho G. Bell

7. During his confinement by enemy forces as aforesaid plaintiff Bell voluntarily served as a monitor in required squad study group meetings organized by the Chinese, beginning about January 1, 1951. These were also known as "forced study groups", which POW's were forced to attend under threat of duress. Armed guards were present at these sessions. The programs consisted of lectures depicting the derogatory aspects of life in the United States, and extolling the idyllic aspects of life under communism. As squad monitor, Bell procured communist propaganda literature from the enemy, distributed said writings among the squad members, and instructed them to read and dis-

cuss this literature. He threatened to turn in the names of any prisoners of war who refused to read or discuss favorably these communist propaganda handouts. In these forced attendance study group meetings he also lectured and led the discussions favorable to the communist cause and condemnatory of the United States, e.g., stating that the United States engaged in germ warfare, that the United States had caused the Korean war, that American forces had committed atrocities, that there were many more advantages about communism than about democracy. He voluntarily attended the special Voluntary Study Group maintained by the Chinese to indoctrinate the so-called "progressives", a term meaning POW's who consorted, fraternized and cooperated with their captors. He voluntarily joined the Peace Committee, whose members espoused communism through public address system broadcasts, and through distribution of propaganda articles and petitions.

8. Plaintiff Bell made tape recordings which were then broadcast over the Peiping radio and over the prison camp's public address system. He stated that the Chinese treatment of the prisoners of war was good, requested that his parents and relatives write President Truman to end the war and withdraw the Seventh Fleet from Formosa, said that the Korean war was senseless, avowed that on the [fol. 65] orders of his platoon leader, his men killed North Korean prisoners of war, vilified President Truman as a warmonger, averred that life was better in China than in the United States, declared the American political parties were led by imperialists.

9. Plaintiff Bell participated in numerous communist propaganda activities. He wrote articles which appeared in the camp newspaper, *Towards Truth And Peace*, and in magazines entitled, *People's China*, and *China Monthly Review*. In these articles plaintiff alleged that American troops had committed atrocities against North Korean civilians and enemy soldiers and that he personally had been ordered to kill women and children and not to take prisoners. He ridiculed the American Army. He praised the good treatment accorded the prisoners of war by the Chinese. He wrote that the United States was unjustified in

sending troops to Korea, and that he wanted to go to China to fight for peace and did not want to return to America. He urged the prisoners of war to vow to fight for world peace on their return to the United States. He accused President Truman of forcing the United States into war and said that if given the opportunity he would run a tank over the President's body. Plaintiff Bell was paid money to write these articles. With the money he was paid to write these articles, he purchased candy and cigarettes in the Chinese Post Exchange in Pyoktong.

10. Plaintiff Bell was a member of the so-called "Wall Paper Committee" whose duties were to hang enemy propaganda articles, pictures, cartoons and slogans on the camp bulletin board. He delivered lectures before his company and to the camp upon American aggression, and belittled America's economic and educational systems. He wrote letters to the United Nations in which he declared that American troops had committed atrocities against enemy civilians and soldiers, and that prisoners of war were receiving good treatment from their captors.

11. Plaintiff Bell drew cartoons and posters depicting American atrocities and use of germ warfare, which were pinned upon the camp bulletin boards and printed in the above-named publications. He drew up and signed peace petitions addressed to President Truman, the United Na- [fol. 66] tions, to relatives of prisoners of war, and to peace organizations, e.g., Stockholm Peace Appeal, the Vienna Peace Conference, and the Asia and Pacific Peace Conference. Further, the Chinese made motion pictures of plaintiff as he signed the petition addressed to the Asia and Pacific Peace Conference. He led a group of so-called progressives in camp carrying banners depicting President Truman as a clown and slogans reading "Down with capitalists". Plaintiff Bell appeared in bi-monthly plays—one entitled "Golden Boy" depicting poverty and racial discrimination in the United States, and the other which he wrote was entitled "The Highest Stage of Capitalism" concerning the overthrow of the United States. He appeared voluntarily in a Chinese motion picture in which he portrayed an American rifleman captured by the communists.

The motion picture depicted atrocities committed by American soldiers and the low morale of the American forces. He also signed surrender leaflets. He attempted to persuade and/or persuaded other prisoners of war to join the Voluntary Study Group and the Peace Committee. He also tried to persuade and/or persuaded other POW's to sign petitions, to follow and accept communistic theories, and to make recordings.

12. Plaintiff Bell made the following statements—that for every good point about the American Government, there were three good things about communism, that the South Koreans started the war and that it was like the Civil War in the United States, that American troops were tools and hatchet-men of American imperialists, that the United States and the United Nations had no right to be in war, that the United States engaged in germ warfare, that if he were given a weapon he would fight against the United States and that he had attempted to join the Chinese Army but had been refused, that he would return from China in five years and would teach communism and help fight for communism, that the working people are slaves and cannon fodder for the capitalists, that he was not going to return to the United States and planned to renounce his citizenship and stay in China to fight for the peoples' side.

13. Plaintiff Bell wore the Chinese uniform, plus the Peace Dove Medal (given by the Chinese to show that the wearer was in sympathy with communism) and the Mao [fol. 67] Tse Tsung medal (given by the Chinese to so-called "progressives") to identify them as communists and to reward them for their achievements and learning in communistic ideology. He consorted with the Chinese. He attended enemy parties held in Pyoktong. He visited the Chinese company and regimental headquarters in the prison camp frequently, in the day and at night. He took walks and talked with Chinese officers, inside and outside the camp. He was accorded special privileges by the Chinese, e.g., more and better food and drink, better medical treatment, freedom of the camp, lighter work details.

14. As squad leader in Camp No. 5, he sold food intended for the sick to other POW's at $5 a bowl. As monitor of the

forced study group, he had food rations for some men cut down because they would not favorably discuss communism, and threatened to turn in the names of men who did not study the communistic literature. He informed on other POW's. As monitor of the forced study group, he would inform the Chinese if a squad member refused to read required propaganda literature, or failed to voice a procommunist opinion in the discussion periods. He told the Chinese that a certain POW was planning to escape and, as a result, the POW was placed in solitary confinement. He told the Chinese that he and others in his outfit had killed Chinese POW's and this falsification caused the Chinese to attempt to pressure another POW into writing a story about these atrocities. He told the Chinese that the 2d Infantry Division massacred South Korean civilians. A United States POW was interrogated as a result of plaintiff's written statement to the Chinese that American troops herded communist POW's on a ship and injected poison gas into their blood, that the American Air Force bombed women and children, and that he saw an American lieutenant and enlisted men rape a Korean woman.

15. Plaintiff Bell turned in names to the Chinese of POW's whom he had ordered to obtain their rations, but who had been too ill to obey. He reported a POW who had refused to fall out for exercise, who was therefore sentenced to 15 days at hard labor with his rations cut to one meal a day. He informed on POW's who stole wood from the Chinese. He also informed the Chinese that POW's had [fol. 68] stolen food for which acts they were put into solitary confinement. As a result of plaintiff's relation to the Chinese, a POW had a fight with another POW and one of them was placed in solitary. Because he reported to the Chinese that certain POW's had criticized him, these POW's were made to stand outdoors in the sun all day and were sentenced to hard labor. He reported to the Chinese the name of a POW who planned to escape, and the latter was placed in "the hole"[1] where he died. Because he gave

[1] The "hole" was a damp hole in the earth of dimensions which did not permit the occupant to stand, sit, or lie down. It was covered by a tin roof and lacked sanitation facilities.

the names to the Chinese of POW's who participated in a sit-down strike, one of the men was bayonetted and the rest were placed in solitary. A POW was forced to stand in an icy river because plaintiff told the Chinese that the former had "talked back" to him.

16. The Korean armistice was signed July 27, 1953, and prisoner repatriation began August 5, 1953, at Panmunjon. Plaintiff Bell refused repatriation and voluntarily elected to go to communist China. After going to communist China, he attended the Ideological Reformation School in Taiyuan, China, where communist ideology was taught, for seven months. He was assigned to a machine center on a collective farm in the Yellow River Valley, China, where he worked until his return to the United States. On January 23, 1954, plaintiff Bell was dishonorably discharged from the United States Army. He returned to the United States in July 1955.

William A. Cowart

17. During his confinement by enemy forces as aforesaid plaintiff Cowart stole food from other POW's in the North Korean prison camps. He visited the headquarters of the North Korean forces frequently, and conversed with Korean officers and Russian civilians there. He told the North Korean captors that two fellow POW's had beaten him for stealing their food. He informed a North Korean colonel that the POW's had disobeyed orders by giving prisoners too ill to work full rations rather than half rations. He informed North Korean captors that a POW had stolen foodstuffs and that a POW was planning to escape. He [fol. 69] signed a petition calling on the United Nations forces to lay down their arms. He received extra tobacco rations from the North Korean guards and was given light work details.

18. Subsequent to October 19, 1951, plaintiff Cowart was transferred to Chinese Prisoner of War Camp No. 3. He was a monitor of the forced study group there, and was a member of the Voluntary Study Group attended by all so-called "progressives" for the purpose of communistic indoc-

trination. He influenced or attempted to influence other POW's to join the Voluntary Study Group and to believe in the communistic dogma. He made tape recordings which were later broadcast over Peiping radio and over the camp public address system. He therein broadcast about the good treatment accorded to POW's by the Chinese. He urged that America end the war and the American Government be petitioned to end the war. He declared that the Korean war was useless, that American soldiers were being cheated by the capitalists and warmongers of Wall Street, and that America should cooperate with the Chinese

19. Plaintiff Cowart was a member of the Peace Committee which drew up, signed and circulated peace petitions. He wrote propaganda artices which appeared in *Towards Truth And Peace* and in the *China Monthly Review*. He wrote that American soldiers committed atrocities, that Americans used germ warfare, that the Chinese had a better educational system than the United States in that in America only the wealthy could obtain an education, that the United States used germ warfare, that the American people had been misled and that the United States was waging an aggressive war. He reviewed the communist books he had read. He drew propaganda posters and cartoons, depicting capitalists living off the masses, Uncle Sam hanging from a tree or lying in a coffin with the words written "For Peace and Against American Aggression" and "Down With War Mongers", depicting Uncle Sam carrying a bomb, and Uncle Sam on his knees before a Chinese soldier armed with a bayonet.

20. Plaintiff Cowart acted in several camp plays. One play mocked the various United Nations. Other plays depicted that the use of a germ warfare bomb and the use of [fol. 70] an atomic bomb benefited capitalists, that civilians were being coerced to join the American Army. In another play, he portrayed an American POW who was being treated well by the Chinese while other American soldiers were stupidly fighting in foxholes. Another play satirized President Truman and General Ridgway, at the end of which the actors, including Cowart, said "Down With the United States."

21. Plaintiff Cowart wore a Chinese uniform, the Peace Dove Medal and the Stalin Badge. He informed on POW infractions or actions, for which they were later punished. He reported to the Chinese that POW's had stolen food from the Chinese warehouse, that certain POW's made anti-communist remarks, that he (Cowart) had been beaten by POW's, that certain POW's were either not studying the propaganda given to them or were not giving the correct answers in the forced study group meetings, that a POW was planning to escape, that certain POW's had torn up slogans and pictures in the progressives' Study Club Room.

22. Plaintiff Cowart consorted with the Chinese running the prisoner of war camp, attended Chinese parties, walked and talked with Chinese officers, guards and interpreters, and lived for some time at the Chinese regimental headquarters. He was given special privileges, e.g., better rations, quarters, no work details, and was allowed to make purchases at the Chinese Post Exchange in Pyong-yang.

23. Plaintiff Cowart stated that he believed in communism, that any thinking person would adopt communism, that he hated America, that its Government should be overthrown, that he desired to study in China and return to the United States in five years to help in the overthrow of the Government, which was inevitable, that the American Government was fascistic, similar to the German Government. He wrote a letter to Mao Tse Tsung in which he stated his belief in communism, criticized the American economic and educational systems, asked for the opportunity to study in China and join the communist party, and gave thanks for the kind treatment accorded him by the Chinese.

24. The Korean armistice was signed July 27, 1953, and prisoner repatriation began August 5, 1953, at Panmunjon. Plaintiff Cowart refused repatriation and voluntarily elected to go to communist China. After going to commu- [fol. 71] nist China he voluntarily attended a communist indoctrination school at Taiyuan, China, where communist ideology was taught, for seven months. On January 23, 1954, plaintiff Cowart was dishonorably discharged from the United States Army. In July 1955, he returned to the United States.

Lewie W. Griggs

25. During his confinement by enemy forces as aforesaid plaintiff Griggs was a monitor in the forced study group meetings in the prisoner of war camp wherein he led the discussions after he had lectured on communism. He was also a member of the Voluntary Study Group which he attended regularly with other so-called "progressives". He was a member of the Peace Committee which drew up, signed and circulated peace petitions. He attempted to influence and persuade POW's to join the Voluntary Study Group and Peace Committee, to sign petitions, and to follow communistic doctrines. He wore a Peace Dove Medal, and also wore a black arm band at Stalin's death. As a member of the Permanent Peace Committee he wore a cloth inscribed with Chinese writing on his chest.

26. Plaintiff Griggs was a member of a Kangaroo Court invoking punishment on POW's for infractors. He appeared as a witness against a POW and signed his name to the charges. A POW, after being released from a cellar by the Chinese, was returned to the cellar at the suggestion of the Peace Committee on which plaintiff Griggs served. He recommended to the Chinese various punishments to be meted out to POW's for breaking rules, while other squad members stated that nothing should be done. He informed on POW's. He revealed names to the Chinese of POW's who led a mass exodus from a communist entertainment show. He disclosed to the Chinese the name of a POW who had planned to escape. As monitor, he disclosed the names of those who criticized communism or refused to study communistic literature, and revealed the names of POW's who had stolen food and tobacco from the Chinese warehouse.

27. Plaintiff Griggs made recordings for the Chinese radio, which were also sent out over the camp public address system. Roundtable discussions of the so-called "progressives", in which plaintiff participated, were recorded [fol. 72] and broadcast. He spoke over the camp public address system. The subjects of these recordings and broadcasts were, that atrocities had been committed by American troops, that the American Government should be over-

thrown, that the Korean war was the fault of the United States. One of the recordings, which was directed to plaintiff's mother and played back over the public address system, requested that his mother join organizations for peace and persuade President Truman to withdraw troops from Korea. As a member of the Peace Committee, he drew up, signed and circulated peace petitions which urged the cessation of war and the use of bombs and germ warfare by the United States. He signed surrender leaflets and letters addressed to his friends which were dropped behind United Nations lines. These letters and leaflets urged surrender and described the good treatment provided by the Chinese.

28. Plaintiff Griggs wrote propaganda articles to which he signed his own name or unauthorizedly signed the name of another POW. These articles were published in *Towards Truth and Peace* and in other camp publications. In these articles he urged that the United States should cease fighting, declared that the United States used germ warfare and committed atrocities, and stated that the Chinese were good friends. He delivered speeches to groups of POW's to the effect that he and a committee had read confessions of American Air Force officers as to the use of bacteriological warfare and that he (Griggs) believed the confessions. He wrote letters to various groups and individuals in the United States urging them to write to the Government requesting peace. He uttered pro-communist and anti-American statements, e.g., that the United States was the aggressor, a warmonger, that American capitalists in control of the Government started the Korean war, that if he were given a weapon he would fight the United Nations forces, that the United States used germ warfare, that the study of communism was beginning to make sense to him, that he believed in communism, that the Chinese were right in embracing communism, that when he returned to the United States it would be communistic and he would be a hero, that the whole world would be dominated by communism in ten years and that individuals similar to him would be [fol. 73] leaders, that he would join the communist party when he returned to the United States, that he would sell out the United States for a tailor-made cigarette.

29. Plaintiff Griggs consorted with the Chinese in the prisoner of war camp, attended enemy parties, visited Chinese headquarters frequently, walked and talked with enemy officers and interpreters, and called or referred to the Chinese as "comrades". He was accorded special privileges in that he received better food, drink, medical treatment, had freedom of the camp and did not have to go out on work details.

30. The Korean armistice was signed July 27, 1953, and prisoner repatriation began August 5, 1953, at Panmunjon. Plaintiff refused repatriation and voluntarily elected to go to communist China. He signed letters prepared by the Chinese addressed to the families of Edward Dickenson and Claude Dickenson. In these letters plaintiff declared the imprisonment of these two men was unjust. He attended a communist indoctrination school at Taiyuan, China, for six months. He was assigned to a state farm in the Yellow River Valley, China, and later was transferred to a factory at Kaifeng until his return to the United States. On January 23, 1954, plaintiff Griggs was dishonorably discharged from the United States Army. He returned to the United States in July 1955. On his return he stated that he returned to the United States because China was a slave state and because having a job, going to school, taking vacations and having a family and hobbies were practically out of reach in China.

General

31. With reference to the plaintiffs' assertions while confined as POW's that the United States engaged in germ warfare in Korea, as related in findings 7, 11, 12, 19, 20, 27 and 28, *supra*, at trial the plaintiffs' counsel stipulated that neither the United States nor any of the United Nations forces engaged in germ warfare in Korea. The defendant produced as witnesses certain Army staff officers who testified authoritatively that the United States did not authorize the use of germ warfare in Korea, did not ship any materials or equipment to Korea for that purpose, and received [fol. 74] no requests for such materials or equipment, although the defendant conceded that at all relevant times the

United States possessed in the United States a military potential to wage germ warfare. In view of the concession by plaintiff's counsel that the United States did not use germ warfare in Korea, the commissioner sustained plaintiffs' objection to the defendant's testimony but permitted it to remain in the record as defendant's offer or proof under Rule 41(c). The plaintiffs endeavored, without success and only through the medium of cross-examining defendant's witnesses, to establish that they originally had reasonable grounds to believe that their statements as to germ warfare while POW's were true when made.

32. With reference to plaintiff Bell's statement to the Chinese that American troops had injected poison gas into the blood of communist POW's on a ship (finding 14, *supra*), plaintiffs' counsel stipulated at trial that this had not been done.

33. With reference to the plaintiffs' assertions while confined as POW's that conditions in the POW camps in North Korea where captured Americans and their allies were confined were good, plaintiffs' counsel stipulated that such conditions were not good. The defendant established by affirmative proof that conditions in the communist POW camps in North Korea were so grossly inadequate as to food, clothing, sanitation, shelter, and medical care that the death rate of POW's was nearly 40 percent in certain camps.

Damages

34. After each plaintiff was captured and before each plaintiff refused repatriation and elected to go to communist China, the Department of the Army took routine administrative action to reflect a change in each plaintiff's records to show them as Corporals as of May 1, 1953. None of the plaintiffs has received any pay for the period from the date he was captured to January 23, 1954, the date each was dishonorably discharged, except amounts advanced by the Army for insurance and allotments for the dependents of each plaintiff. It was stipulated by the parties that, if this court decides that the plaintiffs, or any of them, are

[fol. 75] entitled to recover as a matter of law, the net amount of damage suffered by each plaintiff by reason of the allegations in the petition is as follows:

Otho G. Bell	$1,455.29
William A. Cowart	4,991.13
Lewie W. Griggs	2,810.14

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are not entitled to recover, and the petition therefore is dismissed.

The court further concludes as a matter of law that the defendant is not entitled to recover of and from the plaintiffs on its counterclaims, and the counterclaims are therefore dismissed.

[fol. 76] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 77]

SUPREME COURT OF THE UNITED STATES

No. 942—October Term, 1959

OTHO G. BELL, et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

William A. Cowart, RA 14 313 076
12 Jul 50 - 23 Jan 54

CREDITS

Balance due 12 Jul 50			$ 39.34
PFC (under 2 years' service)	12 Jul 50 - 6 Jan 51	@ $ 95.55	$ 557.37
PFC (over 2 years' service)	7 Jan 51 - 30 Apr 52	@ 102.90	1625.82
PFC (over 2 years' service)	1 May 52 - 6 Jan 53	@ 107.02	877.56
PFC (over 4 years' service)	7 Jan 53 - 30 Apr 53	@ 114.66	435.71
CPL (over 4 years' service)	1 May 53 - 23 Jan 54	@ 137.59	1206.20
Foreign Duty Pay	12 Jul 50 - 30 Apr 53	@ 9.00	302.70
Foreign Duty Pay	1 May 53 - 23 Jan 54	@ 13.00	113.97
Combat Pay	1 Jul 50 - 31 Oct 50	@ 45.00	180.00
Soldiers Deposits			10.00
Interest on Soldiers Deposits			1.71
		Total Credits	$5350.38

DEBITS

Soldiers Home	12 Jul 50 - 23 Jan 54	@ $ 0.10	$ 4.25
		Balance Due	$5346.13

EXHIBIT "G" TO COMMISSIONER'S REPORT

Lewie W. Griggs, RA 18 322 825
25 Apr 51 - 23 Jan 54

CREDITS

Balance due 25 Apr 51				$ 63.33
PFC (under 2 years' service)	25 Apr 51 - 3 Aug 51	@	95.55	315.32
PFC (over 2 years' service)	4 Aug 51 - 30 Apr 52	@	I02.90	915.81
PFC (over 2 years' service)	1 May 52 - 30 Apr 53	@	107.02	1284.24
CPL (over 2 years' service)	1 May 53 - 3 Aug 53	@	129.95	402.83
CPL (over 4 years' service)	4 Aug 53 - 23 Jan 54	@	137.59	779.68
Foreign Duty Pay	25 Apr 51 - 30 Apr 53	@	9.00	217.80
Foreign Duty Pay	1 May 53 - 23 Jan 54	@	13.00	113.97
Combat Pay	1 Jul 50 - 31 Jul 51	@	45.00	585.00
Soldiers Deposits				30.00
Interest on Soldiers Deposits				3.70
			Total Credits	$4711.68

DEBITS

Class N Almt	1 May 51 - 31 Dec 53	@	6.40	$ 204.80	
Class E Almt	1 May 51 - 31 May 51	@	10.00	10.00	
Class E Almt	1 Jun 51 - 31 Dec 53	@	50.00	1550.00	
Class E Almt	1 May 51 - 31 Dec 53	@	4.17	133.44	
Soldiers Home	1 May 51 - 23 Jan 54	@	0.10	3.30	
			Total Debits		$1901.54
			Balance Due		$2810.14

The following allotments were paid by the U. S. Army Finance Center for the periods and to the individuals indicated:

Class N Allotment to Veterans Administration for National Service Life Insurance - 1 Aug 49 - 31 Dec 53 at $6.40 per month.

Class E Allotment to Elsie C. Griggs, Box 1294, Neches, Texas - 1 Sep 49 - 31 May 51 at $10.00 per month.

Class E Allotment to Mrs. Albert Griggs, Box 1294, Neches, Texas 1 Jun 51 - 31 Dec 53 at $50.00 per month.

Class E Allotment to Government Personnel Mutual Life Insurance Company, San Antonio, Texas 1 Sep 49 - 31 Dec 53 at $4.17 per month.

Otho G. Bell, RA 18 276 618
30 Nov 50 - 23 Jan 54

CREDITS

Balance due 30 Nov 50				$ 3.32
PFC (under 2 years' service)	30 Nov 50 - 23 Feb 51	@	$ 95.55	$ 270.72
PFC (over 2 years' service)	25 Feb 51 - 30 Apr 52	@	102.90	1461.17
PFC (over 2 years' service)	1 May 52 - 24 Feb 53	@	107.02	1048.80
PFC (over 4 years' service)	25 Feb 53 - 30 Apr 53	@	114.66	252.25
CPL (over 4 years' service)	1 May 53 - 23 Jan 54	@	137.59	1206.20
Foreign Duty Pay	30 Nov 50 - 30 Apr 53	@	9.00	261.30
Foreign Duty Pay	1 May 53 - 23 Jan 54	@	13.00	113.97
Basic Allowance for Quarters	30 Nov 50 - 25 Jan 51	@	45.00	84.00
Basic Allowance for Quarters	26 Jan 51 - 30 Apr 52	@	67.50	1023.75
Basic Allowance for Quarters	1 May 52 - 23 Jan 54	@	77.10	1601.11
Combat Pay	1 Aug 50 - 28 Feb 51	@	45.00	315.00
			Total Credits	$7641.59

DEBITS

Class N Almt	1 Dec 50 - 31 Dec 53	@	$ 6.40	$ 236.80	
Class E Almt	1 Dec 50 - 31 Aug 53	@	50.00	1650.00	
Class Q Almt	1 Dec 50 - 31 Jan 51	@	85.00	170.00	
Class Q Almt	1 Feb 51 - 31 Jul 52	@	107.50	1935.00	
Class Q Almt	1 Aug 52 - 31 Aug 53	@	117.10	1522.30	
Class Q Almt	1 Sep 53 - 31 Dec 53	@	167.10	668.40	
Soldiers Home	1 Dec 50 - 23 Jan 54	@	0.10	3.80	
			Total Debits		$6186.30
			Balance Due		$1455.29

Explanation of Debits

The following allotments were paid by the U. S. Army Finance Center for the periods and to the individuals indicated:

Class N allotment to Veterans Administration for National Service Life Insurance 1 Feb 49 - 31 Dec 53 at $6.40 per month.

Class E allotment to Jewell J. Bell, Route 5, Box 494, Olympia, Washington 1 Dec 50 - 31 Aug 53 at $50.00 per month.

Class Q allotment to Jewell J. Bell, Route 5, Box 494, Olympia, Washington 1 Dec 50 - 31 Jan 51 at $85.00 per month.

Class Q allotment to Jewell J. Bell, Route 5, Box 494, Olympia, Washington 1 Feb 51 - 31 Jul 52 at $107.50 per month.

Class Q allotment to Jewell J. Bell, Route 5, Box 494, Olympia, Washington 1 Aug 52 - 31 Aug 53 at $117.10 per month.

Class Q allotment to Jewell J. Bell, Route 5, Box 494, Olympia, Washington 1 Sep 53 - 31 Dec 53 at $167.10 per month.

FILE COPY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. ~~942~~ 92

OTHO G. BELL (1), WILLIAM A. COWART (2), LEWIE W. GRIGGS (3),
Petitioners,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Claims.

ROBERT E. HANNON,
30533 Castro Valley Boulevard,
Castro Valley, California,
Attorney for Petitioners.

Subject Index

		Page
A.	Jurisdictional statement	1
B.	Questions presented	2
C.	Statutes involved	2
D.	Statement of case	3
E.	Opinion below	5
F.	Argument	6
G.	Specification of error	10
	I.	
	Statutory interpretation	10
	II.	
	The determination of non-entitlement by the Department of the Army is conclusive	13
	III.	
	The lower Court did not decide all of the issues presented	21
H.	Reason for allowance of writ	22
	I.	
	Conflict in lower Court decisions	22
	II.	
	Case of large importance	23
Conclusion		24

Table of Authorities Cited

Cases	Pages
Buttfield v. Stranahan, 192 U.S. 470	20
deCarrington v. U. S. (1911), 46 Ct. of Cl. 279	6, 9
Gadsten v. United States, 72 F. Supp. 126	14
Lewis v. The United States, 92 U.S. 618	12
Peiffer v. U. S. (1943) 96 Ct. of Cl. 344	6

Pages

Reid v. Covert, 354 U.S. 1 5

Toth v. Quarles, 350 U.S. 11 5

U. S. v. Chase, 135 U.S. 255 12

U. S. v. Reese, 92 U.S. 214 13

U. S. ex rel. Innes v. Hiatt (3rd Circuit), 141 F. 2d 664 .. 20

Walsh v. U. S., 43 Ct. of Cl. 225 ..... 7, 9

White v. U. S. (1931) 72 Ct. of Cl. 459 .....7, 8, 9, 22

Constitutions

Constitution of the United States, Fifth Amendment 20

Rules

Rules of the Supreme Court, Rule 23 (28 U.S.C. Rule 23) .. 2

Statutes

Act of February 13, 1925, Section 3(b), as amended by the Act of May 22, 1939, 62 Stat. 928 (28 U.S.C. 1255) 2

3 Stat. L. 114, Section 14 10

10 U.S.C. 846 .....2, 6, 9, 10, 11, 14, 15, 22

50 U.S.C. Appendix:

Pages 1002-1009 ..... 2, 14

Page 1002 .....6, 9, 15

Page 1009 .....13, 14, 15

Texts

Crawford, "Statutory Construction" (Thomas Law Book Company, 1940), at pages 269 and 270 11

McCaffrey, "Statutory Construction" (New York Central Book Company, Inc. 1953) at page 25 11

Miscellaneous

3 Op. Att. Gen. 641 (1841) 6

Uniform Code of Military Justice, Article 104 4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. ———

OTHO G. BELL (1), WILLIAM A. COWART (2), LEWIE W. GRIGGS (3),
Petitioners,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Claims.

COMES NOW the petitioners, Otho G. Bell, William A. Cowart, and Lewie W. Griggs, and pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on the 2nd day of March, 1960. This decision is unreported on the date of this writing.

A. JURISDICTIONAL STATEMENT.

This appeal is taken from a judgment of the United States Court of Claims entered on March 2, 1960.

Jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 62 Stat. 928 (28 U.S.C. 1255). Rules of Review by this Court of the judgments of the Court of Claims by certiorari, are provided for in Rule 23 of the Rules of the Supreme Court of the United States relating to certiorari (28 U.S.C. Rule 23).

B. QUESTIONS PRESENTED.

1. Can the Department of the Army administratively determine that, due to misconduct, a person who has enlisted in the Army and who has not been discharged from the Army, has forfeited his right to pay and allowances?
2. Can the Department of the Army, by its unilateral administrative act (viz., other than by Court Martial), legally make a retroactive ruling that a former member of the Army is not entitled to his pay and allowances for a period of active duty, because of his misconduct during a portion of such period?

C. STATUTES INVOLVED.

The applicable statutes are:

1. 10 U.S.C. 846 (Appendix B)
2. 50 U.S.C. Appendix 1002-1009, the so-called Missing Persons Act (Appendix C).

D. STATEMENT OF CASE.

The following facts have been established by the judgment below, the Commissioner's report or by admissions in the pleadings:

1. *Enlistment.* That each of the petitioners enlisted in the United States Army on the following dates:

   Otho G. Bell, January 29, 1949;
   William A. Cowart, January 7, 1949;
   Lewie W. Griggs, August 4, 1949.

2. *Capture.* That each of the petitioners was captured by either the North Korean forces or the Chinese Communist forces in Korea on the following dates:

   Otho G. Bell, November 30, 1950;
   William A. Cowart, July 12, 1950;
   Lewie W. Griggs, August 25, 1951.

3. *Rank.* That at the time of capture each of the petitioners was a Private 1st Class.

4. *Promotion.* The records of the Department of the Army shows that each of the petitioners was made a Corporal as of May 1, 1953.

5. *Confinement.* Each of the petitioners was confined as a Prisoner of War from the date of his capture until August 5, 1953, when each refused repatriation.

   (Note: This fact is taken from Paragraph XV of respondent's answer. Plaintiffs contend they were Prisoners of War until the date of their discharge.)

6. *Misconduct.* Each of the petitioners at some unknown time after the date of his capture commenced to do various alleged acts of misconduct.

7. *Refusal of Repatriation.* The Korean armistice was signed on July 27, 1953. Prisoner repatriation began on August 5, 1953. Each of the petitioners refused repatriation and went to Communist China some time after August 5, 1953.

8. *Discharge.* Each of the petitioners was dishonorably discharged from the United States Army on January 23, 1954.

9. *Pay.* Exeept for allotments for dependents and insurance, none of the petitioners have received any pay for the period starting some months before their capture to the date of their dishonorable discharges. This includes both regular pay and combat pay.

10. *Voluntary Repatriation.* Each of the petitioners voluntarily returned to the United States in July 1955, and was confined by the United States Army in San Francisco, California, awaiting trial by General Court Martial for violation of Article 104 of the Uniform Code of Military Justice.

11. *Release from Confinement.* On November 10, 1955, the petitioners were released from confinement on writs of habeas corpus issued by the United States District Court for the Northern District of California (Otho G. Bell, et al vs. Robert N. Young, et al, Nos. 34865, 34880 and

34881, United States District Court for the Northern District of California Southern Division). These writs were issued on the basis of *Toth v. Quarles,* 350 U.S. 11 and *Reid v. Covert,* 354 U.S. 1 in that since the petitioners had been discharged from the Army they were no longer amenable to Court Martial jurisdiction. Like the *Toth* and *Reid* decisions the Federal Court did not rule that the petitioners could not be tried, but rather ruled that if they were to be tried, they should be tried in a civilian court where they would enjoy their basic Constitutional guaranties.

12. *Claim for Pay.* On November 8, 1955, the petitioners made claim upon the Department of the Army for their back pay. On October 2, 1956, the Department of the Army denied the petitioners' claim.

13. *Action Below.* On December 31, 1956 the petitioners filed a petition in the United States Court of Claims for their back pay. On March 2, 1960, the United States Court of Claims entered an opinion in which the majority of the Court denied the right of petitioners to any of their pay.

E. OPINION BELOW.

The opinion of the United States Court of Claims (Appendix A) filed March 2, 1960, is, at the time of this writing unreported.

F. ARGUMENT.

The evidence submitted to the Court below shows that the petitioners, after enlisting in the Army, were captured by enemy forces in Korea. They were confined as Prisoners of War until shortly before their discharge. They were not paid from the time of their capture until the time of their discharge. This pay included regular and combat pay earned prior to the date of their capture. Therefore, pursuant to the provisions of 10 U.S.C. 846 and 50 U.S.C.A. Appendix 1002, petitioners are entitled to the same pay subsistence and allowances to which they were entitled at the time of their capture; and in addition, to such pay, subsistence and allowances as they thereafter would have become entitled to.

The pay of a member of the Army is prescribed by law and so long as a person is a member of the Army he is entitled to receive the pay belonging to the office, unless he has forfeited it under some provision of law, whether he has actually performed military services or not; (1841) 3 Op. Att. Gen. 641; *Peiffer v. U. S.* (1943) 96 Ct. of Cl. 344.

In the instant case, the pay of the petitioners is prescribed by 10 U.S.C. 846 and also by 50 U.S.C. Appendix 1002. The petitioners were members of the Army until their discharges on January 23, 1954. Therefore, they are entitled to receive such pay unless they have forfeited it under some provision of law. The only mode by which the pay of a soldier can be forfeited under the law is by the sentence of a Court Martial.

deCarrington v. U. S. (1911), 46 Ct. of Cl. 279.

In *Walsh v. U. S.*, 43 Court of Claims 225, at 231, the Court of Claims held:

> "Aside from this, it has been held by this court in a number of cases that the mere fact that an officer or soldier is under charges it does not deprive him of his pay and allowances, *and such forfeiture can only be imposed by way of a lawful court martial.*" (Citations omitted, emphasis added.)

The Court went on to say in the *Walsh* case:

> "As stated above, the uniform decisions of this court have been that it required the decision of a court martial to deprive an offcer of his pay and allowances."

The clearest statement of this concept of the law as applicable to this ease is found in the decision of the Court of Claims in the case of *White v. U. S.* (1931) 72 Ct. of Cl. 459. In this case a man had enlisted in the United States Marine Corps, without the knowledge of pending civilian charges against him. After enlistment he surrendered to the civilian authorities. The charges against him were dismissed and the question arose as to whether he was entitled to military pay for the period of his confinement under the civilian charges. The Controller General's opinion in this regard was:

> "On general principles of law a man who is rendered incapable through his own misconduct of fulfilling the stipulations of his contract of enlistment can claim nothing under the contract. The government agrees with the enlisted man that for a certain amount of service he shall receive a certain amount of pay. If the man, by his miscon-

> duct and necessary withdrawal from the service, has not performed his part of the contract, the government cannot be held to the fulfillment of its part thereof."

The Court of Claims, however, disagreed with the opinion of the Controller General and cited with approval the opinion of Attorney General Taft and imposed his opinion in the holding as follows:

> "The Controller, I think, misconceived the true basis of the right to pay in the case mentioned. In the Navy, as in the Military Service, the right to compensation does not depend upon, nor is it controlled by, general principles of law; it does rest upon, and is governed by, certain statutory provisions and regulations made in pursuance thereof which especially apply to such services. These fix the pay to which officers and men belonging to the Navy are entitled; and the rule to be deduced therefrom is that both officers and men become entitled to the pay thus fixed so long as they remain in the Navy, whether they actually perform services or not, unless their right thereto is forfeited or lost in some one of the methods prescribed in the regulations averted to."

In the instant case the position of the respondent and apparently the position of the Court of Claims is similar to that of the Controller General in the *White* case. The lower Court and the respondent are saying that the petitioners, by their own misconduct, rendered themselves incapable of fulfilling their contract of enlistment. The lower Court and the respondent, like the Controller General, is saying that since the plaintiffs, "by [their] misconduct and neces-

sary withdrawal from the service [did] not perform [their] part of the contract; the government cannot be held to the fulfillment of its part thereof". But as stated by Attorney General Taft, "In the Military Service the right to compensation does not depend upon, nor is it controlled by, general principles of law. It does rest upon and is governed by certain statutory provisions and regulations . . . these fix the pay to which the officers and men . . . are entitled".

In the instant case 10 U.S.C. 846 and 50 U.S.C.A. Appendix 1002 fix the pay and allowances to which the petitioners are entitled. Therefore, as concluded by the Court of Claims in the *White* case, the soldier is entitled to this pay so long as he remains in the service unless it is forfeited. According to the *deCarrington* and *Walsh* cases, supra, it requires the decision of a Court Martial to forfeit such pay.

The Court in the *White* case, supra, went on to say:

> "It would, we think, be an anomalous proceeding to permit resort to the courts to ascertain whether, under all of the various provisions with respect to pay and allowances of officers and men of the Army, Navy, and Marine Corps, investigation should obtain to determine as a matter of fact whether the soldier had, by conscientious service, earned what the statutory allowed him."

It is submitted that the decision of the lower court is a license to the respondent, to permit the government to "resort to the courts to ascertain whether . . . the soldier had by conscientious service, earned what the statutory allowed him."

G. SPECIFICATION OF ERROR.

The lower Court erred in the following particulars:

I.

STATUTORY INTERPRETATION.

The lower Court held (R. p. 34):

> "In arriving at the intent of the Congress, it is necessary to construe all the provisions of the law together even if sometimes it seems not to be in strict accord with certain specific provisions when they are lifted from the body of the law and read out of context." (Citations omitted.)

Thereafter the lower Court by the office of statutory construction goes on to hold that the Congress, in enacting the two (2) Code Sections above mentioned, intended to exclude persons such as the petitioners from entitlement to pay.

The first Congressional Act providing for continuation of pay for captured military personnel was 3 Stat. L. 114, Sec. 14. In the 145 years since this enactment of 1814, there have been several Federal Statutes similar to 10 U.S.C. 846. This section has been amended a number of times. At the time of this enactment and the amendments thereto, Congress must have been aware of the fact that many soldiers misconducted themselves while Prisoners of War. Though aware of this, Congress did not see fit at the time of the initial enactment or at the time of any of the amendments thereto, to condition the right of the soldier to his pay upon his conduct while a Prisoner of War. The act in its present form does not condition the right of a soldier to his pay upon his con-

duct. Since the act does not specify any condition upon the right of a former Prisoner of War to his pay and allowances, none was intended to exist.

The lower Court in denying the plaintiff's right of recovery under the statute is not construing the statute. The lower Court under the guise of construction has changed the wording of 10 U.S.C.A. 846 to read: "Any person who is in active service . . . *and who remains loyal and faithful* . . .". There are a number of authorities which clearly hold that such judicial legislation is improper.

Crawford in his work *"Statutory Construction"* (Thomas Law Book Company, 1940) at page 269 and 270 states:

> "Where the statute's meaning is clear and explicit, words cannot be interpolated. In the first place, in such a case, they are not needed. If they should be interpolated, the statute would more than likely fail to express the legislative intent, as the thought intended to be conveyed might be altered by the addition of new words. *They should not be interpolated even though the remedy of the statute would thereby be advanced, or a more desirable or just result would occur. Even where the meaning of the statute is clear and sensible, either with or without the omitted words, interpolation is improper, since the primary source of legislative intent is in the language of the statute.*" (Emphasis added. Citations omitted.)

See also McCaffrey—*"Statutory Construction"* (New York Central Book Company, Inc. 1953) at page 25.

The Supreme Court has spoken on the point a number of times. In *U. S. v. Chase*, 135 U. S. 255 at page 261 the Court held:

> "We recognize the value of the rule of construing statutes as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. *But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress*". (Emphasis added.)

And at page 262 the court held:

> "Ashurst, J., said in *Jones v. Smart*, 1 T.R. 51: 'It is safer to adopt what the legislature have actually said than to suppose what they meant to say.' In the *Queensborough cases*, 1 Blight, 497, Lord Redesdale said: 'The proper mode of disposing of difficulties arising from a literal construction is by an act of Parliament, and not by the decision of court.' "

In *Lewis v. The United States*, 92 U.S. 618, p. 621, the Supreme Court held:

> "Where the language of a statute is transparent, and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe."

And at page 623 of the same case, the Supreme Court held:

> "Neither statute contains any qualification, and we can interpolate none. *Our duty is to execute*

the law as we find it; not to make it." (Emphasis added.)

In *U. S. v. Reese,* 92 U.S. 214, the Supreme Court held at page 221:

> "To limit the statute in the manner now asked for would be to make a new law, not to enforce an old one. This is not part of our duty."

In the instant case, this principle is well stated by Justice Madden in his dissent (R. p. 37):

> "The court by adopting the government's argument, has in effect, placed in the disbursing officers of the government the function of *amending* the statutes fixing pay of military or civilian personnel on a quantum meruit basis." (Emphasis added.)

II.

THE DETERMINATION OF NON-ENTITLEMENT BY THE DEPARTMENT OF THE ARMY IS CONCLUSIVE.

On November 8, 1955 the petitioners made claim upon the Department of the Army for their back pay. On October 2, 1956 the Department of the Army denied the plaintiff's claim. The lower Court held that under the provisions of 50 U.S.C. App. 1009, this administrative determination by the Department of the Army was conclusive. The lower Court held (R. p. 35):

> "The Army regulations promulgated under the Missing Persons Act and in force at the time provided that the determination of the head of

> the department, or his designated subordinate, as to status and as to entitlement to pay and allowances under this act shall be conclusive. A. R. 35-1325, dated July 15, 1953.
>
> We held in the case of *Moreno v. United States*, 118 C. Cls. (1950), that under the provisions of Section 1009, Supra, of the Missing Persons Act, the Department Head was authorized to conclusively determine both the status and entitlement to pay under the Act."

This holding is erroneous for a number of reasons:

1—*10 U.S.C. 846:* The lower Court has chosen to completely ignore 10 U.S.C. 846. The Missing Persons Act (50 U.S.C. App. 1002-1009) and 10 U.S.C. 846 are both current and subsisting Federal statutes. The petitioners clearly come within the provisions of 10 U.S.C. 846. This section is completely devoid of any language which gives to the Department of the Army any authority to make any determination as to entitlement to pay. To construe such authority into 10 U.S.C. 846 is to legislate a new law.

2—*The retroactive determination by the Department of the Army under 10 U.S.C.A. App. 1009 was arbitrary and capricious:*

The Court of Claims in *Gadsten v. United States*, 72 F. Supp. 126 at page 127 held:

> "In enumerable cases it has been held that where discretion is conferred on an administrative officer to render a decision, this decision must be honestly rendered, and that if it is arbitrary and capricious, or rendered in bad faith, the courts have power to review it and set it aside."

And at page 128 the court held:

> "Both this court and the Supreme Court have many times held that if the decision is arbitrary or capricious or *so grossly erroneous as to imply bad faith,* it will be set aside. See e.g. *Burchell v. Marsh,* 17 How. 344, 349; *Kihlberg v. United States,* 97 U.S. 398; *U. S. v. Gleason,* 175 U.S. 588; *Ripley v. United States,* 223 U.S. 695." (Emphasis added.)

To be entitled to their pay under one of the two sections involved (50 U.S.C. App. 1002) but not under the other section (10 U.S.C. 846) the petitioners had to meet the following two conditions:

1—Be in active service at the time of his capture. This fact has been admitted by the respondents both in its answer (paragraph V) and in the Stipulation of Facts. (R. p. 14.)

2—Officially determine to be in a status of . . . interned in a foreign country, captured by hostile forces. The lower Court states in its decision (R. p. 33):

> "The fact is that essentially they were *not confined.* They were permitted to go outside the camp, were given practical freedom and in the essence of things *they were no longer in the status of prisoners.*
>
> . . . during the period involved these plaintiffs did not have a *status as prisoners,* . . ." (Emphasis added.)

The respondent, however, in its answer admitted that:

> "The Department of the Army took routine administrative action to reflect a change in plain-

tiffs' record to the grade of Corporal as of May 1, 1953." (R. p. 6.)

and that:

"Plaintiffs were among twenty-one *Prisoners of War* who had served in the Army in Korea, were captured . . ." (R. p. 7.) (Emphasis added.)

These paragraphs of respondent's answer conclusively show that the Department of the Army carried the petitioners in their records as Prisoners of War and had, therefore, during the period of petitioners' captivity, "officially determined that the . . . (petitioners) . . . were absent in a status of capture by hostile forces."

Having met these two conditions, the person is entitled to his pay, "for the period he is officially carried or determined to be in such status . . .". The respondent, in Paragraph XV of its answer (R. p. 7) states:

"Because plaintiffs refused repatriation when they *were released from prison as Prisoners of War,* and because plaintiffs continued in their election until January 23, 1954, they were on that date dishonorably discharged from the Army." (Emphasis added.)

By this paragraph of its answer the respondent admits that the Department of the Army officially carried the petitioners in the status of Prisoners of War until January 23, 1954.

The fact that the Department of the Army gave each of the petitioners a dishonorable discharge on

January 23, 1954, conclusively shows that the Department of the Army officially carried each of the petitioners as a member of the Army until that date. If they were not officially carried as members of the Army until January 23, 1954, what was the necessity for issuing to the petitioners their dishonorable discharge?

The fact that the petitioners "were captured" and were later "released from Prison as Prisoners of War" conclusively shows that the Department of the Army officially carried petitioners as either "interned in a foreign country" or "captured by hostile forces".

The lower Court states:

> "The fact is that essentially they were not confined."

However, the Stipulation of Fact which is embraced in the Commissioner's report (R. p. 14) states:

> "The facts so set forth in the stipulation related to the activities of the plaintiffs while they were detained as Prisoners of War." (R. p. 14.)
>
> "During his confinement by enemy forces as aforesaid plaintiff Bell . . ." (R. p. 14.)
>
> "During his confinement by enemy forces as aforesaid plaintiff Cowart . . ." (R. p. 14.)
>
> "During his confinement by enemy forces as aforesaid plaintiff Griggs . . ." (R. p. 21.)
>
> "With reference to plaintiffs' assertion while confined as P. O. W.'s . . ." (R. p. 24.)

Having made all of the above mentioned prior preliminary "official determinations" necessary to en-

title the respondents to their pay, the Department of the Army on the late date of October 2, 1956, arrived at the entirely inconsistent conclusion that the petitioners were not entitled to their pay. After establishing the basic premise which demands the conclusion of entitlement to pay, the Department of the Army arrived at the contrary conclusion. Such conclusion therefore is not only at war with the rules of basic logic, but is "so grossly erroneous as to imply bad faith" and is therefore arbitrary and capricious.

It is submitted that the intent of Congress in adding Section 1009 to the so-called Missing Persons Act was to authorize the administrative branch of the Government to administer the Act; that is, to determine in each particular case whether or not the individual fulfilled the factual requirements of the statute so as to be entitled to pay. It is submitted that Congress did not intend to give the administrative branch the legislative power of adding new conditions to the Act. (See Justice Madden's dissent, supra, p. 13.)

In the instant case the Department of the Army, prior to October 2, 1956, had determined that the petitioners had met all of the factual requirements specified by the Congress, to entitle a person to the benefits of the Act. However, on October 2, 1956, the Department decided to add or enact an additional requirement to those specified by Congress. The Department of the Army, in making its "official determination" on October 2, 1956, in effect, stated that in addition to the requirements enacted by Congress, the missing

person also had to establish that he had not been guilty of any misconduct. Such administrative legislation is clearly beyond the Constitutional powers of the administrative branch of the Government and far outside any authority granted to it by the Missing Persons Act. This principle is stated in a different way by Justice Madden in his dissent in the instant case (R. p. 38):

> "It is noteworthy that after Congress abolished the historical power of Courts Martial to forfeit accrued pay, the Army, apparently for the first time in history, forfeited the pay already accrued to these plaintiffs, not by the process of trial and sentence, which was forbidden by the statute, but by the crude and primitive method of refusing to give them their money. Finding nothing in the law books to justify its refusal to pay these men, it threw the books away and just refused to pay them. It could have set before these confused young men a better example of government by law."

3—*Unconstitutional Interpretation of the Act.*

The lower Court's holding that the administrative determination by the Department of the Army is conclusive, is erroneous in that to so interpret the Act, would render the Act unconstitutional.

Another basic rule of statutory interpretation is that every act of the legislature is presumed to be valid and constitutional. Or, stated another way, the rule is that where a statute is fairly open to either of two constructions, one of which will make it constitutional and the other unconstitutional, the con-

struction will be adopted which will reconcile the statute with the Constitution. (See *Buttfield v. Stranahan,* 192 U.S. 470.)

A person is a member of the land or naval forces from the date of his enlistment into the service until the date of his discharge from the service. In the instant case each of the petitioners was a member of the land or naval services from the date of his enlistment until the date of his dishonorable discharge on January 23, 1954.

It is submitted that the right of a serviceman to his earned pay is a property right, protected by the Fifth Amendment to the Constitution of the United States. That is to say, a member of the land or naval forces cannot be deprived of his earned pay without due process of law. A member of the land or naval forces cannot be deprived of his pay without "his day in court". In *U. S. ex rel. Innes v. Hiatt* (3rd Circuit), 141 F. 2d 664, it was held:

> "An individual does not cease to be a person within the protection of the Fifth Amendment of the Constitution because he joined the nation's Armed Forces and has taken the oath to support the Constitution with his life, if need be. The guaranty of the Fifth Amendment that: 'No person shall . . . be deprived of his life, liberty or property, without due process of law,' makes no exception in the case of persons who are in the Armed Forces."

To interpret Section 1009 of the Missing Persons Act in a manner as to allow the administrative branch of the government to forfeit or deprive a serviceman

of his earned pay for a period after his enlistment and before his discharge, without any type of hearing or notice, would constitute a deprivation of a property right without due process of law, and would thus render the act unconstitutional.

III.

THE LOWER COURT DID NOT DECIDE ALL OF THE ISSUES PRESENTED.

The Department of the Army not only forfeited the petitioners' pay for the later period of their confinement when they were allegedly guilty of misconduct, but also forfeited their pay for the earlier period of their confinement before they are alleged to have begun their course of misconduct. In fact the Army forfeited the pay which had accrued to the petitioners prior to their capture. The lower Court states (R. p. 33):

> "Such a finding was implicit in a determination that they should not be paid for the period following capture". (Emphasis added.)

The petitioners are petitioning not only for their pay which accrued following capture, but are also petitioning for both combat and regular pay which accrued to them prior to their capture. The lower Court makes no mention of such precapture pay. It would hardly seem that subsequent misconduct should have such a retroactive effect as to cause a forfeiture of pay accruing prior to such misconduct.

H. REASON FOR ALLOWANCE OF WRIT.

The writ should issue in the instant case for the following reasons.

I.

CONFLICT IN LOWER COURT DECISIONS.

1. As hereinbefore demonstrated, there is an irreconcilable conflict between the decision of the Court of Claims in the instant case, and the decision of that Court in *White v. U. S.*, supra.

   In the *White* case the Court held:

   > ". . . investigation should not obtain to determine as a matter of fact whether the soldier had, by conscientious service, earned what the statutory allowed him."

   In the instant case the Court has permitted investigation to obtain to determine as a matter of fact whether the petitioners have by conscientious service, earned what 10 U.S.C. 846 allowed them.

2. There is an irreconcilable conflict between the decision in the instant case and the long line of decisions which hold that the pay of a member of the land and naval forces can only be forfeited by action of a lawful court martial.

3. There is an irreconcilable conflict between the decision in the instant case and the long line of decisions which hold that it is the duty of the judiciary to execute the law, not make it.

II.

CASE OF LARGE IMPORTANCE.

In our time substantially every young man will become a member of the Armed forces, and as such will be entitled to various types of pay and allowances. All of the various types of pay and allowances to which military personnel are entitled are fixed by statute.

The decision of the lower Court, though dealing with specific military pay statutes, does not purport to limit itself to those statutes.

The decision of the lower Court grants to the disbursing officer the right to amend these various statutes and to determine whether the serviceman has earned the pay or allowance which a particular statute may allow him. This places an unconscionable burden on the serviceman. If a disbursing officer decides that a soldier, by his misconduct, has not earned a particular type of pay or allowance, he would be at liberty to refuse to pay him for such past period as he unilaterally decided the soldier was guilty of misconduct. Such a soldier, not having a chance to be heard, would be forced to the great expense and delay of bringing an action in the Court of Claims to determine whether such misconduct existed, when it started and whether and when it was sufficiently acute to cause a forfeiture of the particular type of pay or allowance in question. Thus the decision of the lower Court places all existing and future members of the Armed forces in a very insecure and inequitable position.

The decision is one of utmost concern to a large segment of our society.

It is indeed unfortunate that the judicial reestablishment of basic human rights does not always occur in cases involving meritorious litigants. It is frequently the weak and misguided who, in their downfall, preserve the rights of the strong.

CONCLUSION.

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari be granted in order that these important issues might be decided.

Dated, May 12, 1960.

ROBERT E. HANNON,
Attorney for Petitioners.

(Appendices A, B and C Follow.)

Appendix A

In the United States Court of Claims
No. 547-56
(Decided March 2, 1960)

Otho G. Bell (1), William A. Cowart (2), Lewie W. Griggs (3) v. The United States

Mr. Robert E. Hannon for the plaintiffs.

Mr. Francis X. Daly, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for the defendant. *Mr. Sheldon J. Wolfe* was on the brief.

OPINION

JONES, *Chief Judge,* delivered the opinion of the court:

The plaintiffs sue for pay and allowances which they claim to be due them as prisoners of war from the dates of capture in 1950 and 1951 until their discharge from the Army on January 23, 1954.

They had enlisted in the United States Army at different dates in 1949. At the time of their capture they were privates, first class.

The applicable statutes are set out in the footnote.[1] The plaintiffs claim that from the date of their capture

[1] 50 U.S.C. App. § 1002 (1952) provides as follows:
"Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered or besieged shall, for the period he is officially carried or

until their actual discharge they were entitled under the statutes to the regular pay and allowances of soldiers of their classification.

The defendant alleges in the pleadings and it is not denied by the plaintiffs that they were among prison-

determined to be in any such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled thereafter, and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]: *Provided*, That such entitlement to pay and allowances shall not terminate upon expiration of term of service during absence and in case of death during absence shall not terminate earlier than the dates herein prescribed: *Provided further*, That there shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period."

50 U.S.C. App. § 1006 (1952) provides as follows:

"When it is officially reported by the head of the department concerned that a person missing under the conditions specified in section 2 of this Act [section 1002 of this Appendix] is alive and in the hands of a hostile force or is interned in a foreign country, the payments authorized by section 3 of this Act [section 1003 of this Appendix] are, subject to the provisions of section 2 of this Act [section 1002 of this Appendix], authorized to be made for a period not to extend beyond the date of the receipt by the head of the department concerned of evidence that the missing person is dead or has returned to the controllable jurisdiction of the department concerned. When a person missing or missing in action is continued in a missing status under section 5 of this Act [section 1005 of this Appendix], such person shall continue to be entitled to have pay and allowances credited as provided in section 2 of this Act [section 1002 of this Appendix] and payments of allotments, as provided in section 3 of this Act [section 1003 of this Appendix], are authorized to be continued, increased, or initiated."

50 U.S.C. App. § 1009 (1952) provides as follows:

"The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001-1012 and 1013-1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death

ers who were captured; that these three refused to be repatriated and return to the United States when they were released from prison; that instead they chose to remain with the Communists and in a communist country; that between the time of the plaintiffs' cap-

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or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. The determination of the head of the department concerned, or of such subordinate as he may designate, shall be conclusive as to whether information received concerning any person is to be construed and acted upon as an official report of death. When any information deemed to establish conclusively the death of any person is received in the department concerned, action shall be taken thereon as an official report of death, notwithstanding any prior action relating to death or other status of such person. If the twelve months' absence prescribed in section 5 of this Act [section 1005 of this Appendix] has expired, a finding of death shall be made whenever information received, or a lapse of time without information, shall be deemed to establish a reasonable presumption that any person in a missing or other status is no longer alive. Payment or settlement of an account made pursuant to a report, determination, or finding of death shall not be recovered or reopened by reason of a subsequent report or determination which fixes a date of death except that an account shall be reopened and settled upon the basis of any date of death so fixed which is later than that used as a basis for prior settlement. Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act [sections 1001-1012 and 1013-1016 of this Appendix], to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: *Provided*, That no such account shall be charged or debited with any amount that any person in the hands of a hostile force may receive or be entitled to receive from, or have placed to his credit by, such hostile force as pay, wages, allowances, or other compensation: *Provided further*, That where the account of any person has been charged or debited with allotments paid pursuant to this Act [said sections] any amount so charged or debited shall be recredited to such person's account in any case in which it is determined by the head of the department concerned, or such subordinate as he may designate, that payment of such amount was induced by fraud or misrepresentation to which such person was not a party. When circumstances warrant reconsideration of any determination authorized to be

ture and the time of their dishonorable discharge each plaintiff adhered to, worked for, and collaborated with the enemy of the United States; that since they refused repatriation when they were released from prison and since they continued in their election until January

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made by this Act [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. Excepting allotments for unearned insurance premiums, any allotments paid from pay and allowances of any person for the period of the person's entitlement under the provisions of section 2 of this Act [section 1002 of this Appendix] to receive or have credited such pay and allowances shall not be subject to collection from the allottee as overpayments when payment thereof has been occasioned by delay in receipt of evidence of death, and any allotment payments for periods subsequent to the termination, under this Act [sections 1001-1012 and 1013-1016 of this Appendix] or otherwise, of entitlement to pay and allowances, the payment of which has been occasioned by delay in receipt of evidence of death, shall not be subject to collection from the allottee or charged against the pay of the deceased person. The head of the department concerned, or such subordinate as he may designate, may waive the recovery of erroneous payments or overpayments of allotments to dependents when recovery is deemed to be against equity and good conscience. In the settlement of the accounts of any disbursing officer credit shall be allowed for any erroneous payment or overpayment made by him in carrying out the provisions of this Act [sections 1001-1012 and 1013-1016 of this Appendix], except sections 13, 16, 17, and 18 [sections 1013 and 1016, and former sections 1017, 1018 of this Appendix], in the absence of fraud or criminality on the part of the disbursing officer involved, and no recovery shall be made from any officer or employee authorizing any payment under such provisions in the absence of fraud or criminality on his part."

10 U.S.C. § 846 (1952) provides as follows:

"Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled, while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law. (R.S. § 1288.)"

23, 1954, they were on that date dishonorably discharged from the Army.

These allegations are nowhere disputed.

The defendant asserts that because of these admitted facts the plaintiffs were guilty of a breach of the contracts of enlistment and of their oaths of faithful service; and that therefore each plaintiff abandoned his status as a soldier in the United States Army and forfeited all pay and allowances to which he might have been entitled otherwise.

The undisputed testimony shows that during the period of their confinement each of the three plaintiffs became monitors for the "forced study groups," the sessions of which the prisoners were compelled to attend. Armed guards attended these sessions. The programs included lectures picturing what were declared to be the bad aspects of life in the United States as contrasted with idyllic life under communism. As monitors, they procured and distributed propaganda literature, and threatened to turn in names of any prisoners who refused to read and discuss favorably these propaganda handouts.

Each of the plaintiffs made tape recordings which were used as broadcasts and over the camp public address system. Each of them wore Chinese uniforms and were permitted to attend meetings outside the camp. The details of the plaintiffs' consorting, fraternizing and cooperating with their captors and the devious ways in which they sought favors for themselves, thus causing hardship and suffering to the

other prisoners, are set out in our findings 7 to 30, inclusive.

Two of Bell's recordings were broadcast over the Peiping radio, stating among other things that on the orders of his platoon leader, his men had killed North Korean prisoners of war, and that President Truman was a war monger. In written articles for the camp newspaper he alleged that American troops had committed atrocities and he personally had been ordered to kill women and children and not to take prisoners of war, and that if given the opportunity he would run a tank over the President's body.

Bell was paid money to write these articles. He also delivered lectures before his company and to the camp on American aggression. He appeared voluntarily in a motion picture and appeared in bi-monthly plays. He stated that if given a weapon he would fight against the United States. He sold food intended for the sick to other prisoners of war. By making reports to the Chinese, he caused one man to be bayonetted and others to be placed in solitary confinement.

Cowart did many similar things, wrote propaganda articles accusing American soldiers of atrocities and of using germ warfare. He drew posters and cartoons for the enemy, acted in plays, walked and talked with the Chinese officers, guards and interpreters, lived part of the time at Chinese regimental headquarters, stated he hated America, desired to study in China and to return to the United States in five years to help in the overthrow of the government.

Griggs did many similar things, attended enemy parties, visited Chinese headquarters frequently, referred to the Chinese as comrades, was accorded special privileges, made broadcasts, signed leaflets, wrote articles accusing the American soldiers of atrocities and declared the United States had used germ warfare.

These and many other acts of perfidy are abundantly proved by the record and are nowhere denied either in the pleadings or in the evidence. The record does not disclose any suggestion whatever of brainwashing. As a matter of fact, the record justifies the conclusion that at all times these men did these acts voluntarily for the purpose of helping themselves, in complete disregard of the effect it might have on the treatment of their fellow prisoners. The record does not indicate a touch of loyalty either to their compatriots or to their country after the period they were taken prisoners of war.

The defendant produced at the trials as witnesses certain Army staff officers who testified authoritatively that the United States did not authorize the use of germ warfare in Korea, did not ship any materials or equipment to Korea for that purpose, and received no requests for such materials or equipment. Rather than have this testimony remain in the record as evidence, the plaintiffs' counsel stipulated that neither the United States nor any of the United Nations forces engaged in germ warfare in Korea. In view of this stipulation and concession, the commissioner sustained plaintiffs' objection to this part of defendant's testi-

mony but permitted it to remain in the record as defendant's offer of proof under Rule 41(c).

In reference to plaintiff Bell's statement, as shown in finding 14, that the American troops had injected poison gas into the blood of communist prisoners of war on a ship, a plaintiffs' counsel stipulated at the trial that this had not been done.

After the Korean armistice, which was signed July 27, 1953, and prisoner repatriation had begun on August 5, 1953, each of the plaintiffs refused repatriation and voluntarily elected to go to Communist China. After the plaintiffs were discharged on January 23, 1954, they filed this suit for their pay during the period indicated.

R.S. 1288, 10 U.S.C. § 846, *supra,* was enacted in 1814. Numerous statutes have been enacted and committee reports made since that time. These latter statutes, including sections 1002, 1006, and 1009, *supra,* of the legislation entitled the Missing Persons Act, as amended, cover the cases here presented. In fact, not only the language of the acts themselves, but the committee reports at the time these sections were enacted clearly show that but for this Missing Persons Act there would be no basis of a claim for compensation.[2]

It will be noted that section 1002, as quoted in the footnote, states in effect that any person determined to be "interned in a foreign country, captured by a hostile force, beleaguered or besieged shall, for the

[2]See committee report, U.S. Cong. & Adm. News, 83d Cong., 1st Sess., 1953, p. 1344.

period he is officially carried or determined to be in any *such status,* be entitled" to pay and allowances. (Emphasis supplied.) Section 1006 states in effect that when it is officially reported that a person missing under the conditions specified is alive and *in the hands of a hostile force or is interned in a foreign country* he shall be paid.

Section 1009, which is a part of the same Act, states that "the head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act, and for the purposes of this Act determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act . . . Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act, to pay and allowances . . . . When circumstances warrant reconsideration of any determination authorized to be made of this Act the head of the department concerned, of such subordinate as he may designate, *may change or modify a previous determination.*" (Emphasis supplied.)

This modification in the language of the law completely changes the original act, which was unconditional. These changes in the original act leave not the slightest doubt that it was the intention of the Congress to authorize the head of the department or his agent to determine not only the status but the entitlement to pay.

It is inconceivable that the plaintiffs should be paid in the circumstances disclosed by the undisputed facts in this record. The fact is that essentially they were not confined. They were permitted to go outside the camp, were given practical freedom and in the essence of things they were no longer in the status of prisoners.

The Department, in denying plaintiffs' claims, which were filed with the Department for pay, necessarily determined under the provisions and authority of the statute just quoted that during the period involved these plaintiffs did not have a status as prisoners, and were not entitled to pay under the quoted statutes. It was determined under the provisions of section 1009, quoted above, that they were not entitled to their pay. Such a finding was implicit in a determination that they should not be paid for the period following capture. This determination is fully supported by the record made here.[3]

It is almost incredible that these men would ask for pay in light of the conduct disclosed by the record.

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[3]The Army in denying payment of plaintiffs' claims stated in part as follows:

"I have been advised that the following determinations have been made regarding the status of all United States Army Voluntary Non-Repatriates who elected not to accept repatriation to United States control under the terms of the Korean Armistice Agreement prior to 23 January 1954:

"a. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954, under the terms of the Korean Armistice Agreement have, as demonstrated by their refusal to elect repatriation to the United States and their records as prisoners of war, adopted, adhered to or supported the aims of Communism, one of which is the overthrow of all non-Communist governments, including the Government of the United States, by force or violence."

In arriving at the intent of the Congress, it is necessary to construe all the provisions of the law together even if sometimes it seems not to be in strict accord with certain specific provisions when they are lifted from the body of the law and read out of context. *Luna v. United States,* 124 C. Cls. 52 (1952); *Olney v. United States,* 123 C. Cls. 285 (1952); *United States v. Kirby,* 74 U.S. 482 (1868); and *Heydenfelt v. Daney Gold etc. Co.,* 93 U.S. 634 (1876), from which we quote, at page 638, the following:

> It is true that there are words of present grant in this law; but, in construing it, *we are not to look at any single phrase in it, but to its whole scope,* in order to arrive at the intention of the makers of it. . . . If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment. (Emphasis supplied.)

The *Kirby* case involved an indictment of a sheriff and his posse under a statute which prohibited a willful obstruction of the United States mails. The sheriff had arrested a mail carrier who had been indicted for murder. In holding the statute not applicable, the Supreme Court, at page 487, made the following statement:

> The common sense of man approves the judgment mentioned by Puffendorf, that the Bolo-

gnian law which enacted, "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt." And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.

The defendant urges numerous defenses, including the claim that the statute which provided for pay "during captivity" is inapplicable because the plaintiffs were not really in captivity.

The Army regulations promulgated under the Missing Persons Act and in force at the time provide that the determination of the head of the Department, or his designated subordinate, as to status and as to entitlement to pay and allowances under this Act shall be conclusive. A.R. 35-1325, dated July 15, 1953.

We held in the case of *Moreno v. United States,* 118 C. Cls. 30 (1950), that under the provisions of section 1009, *supra,* of the Missing Persons Act, the Department head was authorized to conclusively determine both the status and entitlement to pay under the Act.

To adopt the construction for which plaintiffs contend would lead the entire purpose of the law into an absurdity.

The plaintiffs admit that they gave aid and comfort to the enemy. The pleadings and stipulations establish that fact. They made it far more difficult for their compatriots who were there with them. They made tape recordings to be used for encouraging the enemy and for discouraging the people of their own country. One of them took pay for these admitted acts. The others were paid in various privileges and advantages. Who can say that these broadcasts and other acts did not cause loss of life in the struggle? Certainly it added to the hardships and suffering of their compatriots. The proof of these acts is overwhelming in the record. They were denied neither in the pleadings nor in the evidence.

For the purposes of a suit for civilian pay these facts are abundantly proven. For penalty or punishment purposes a trial by a court martial or for treason is perhaps necessary, but this is a civil court in which plaintiffs must establish their rights to affirmatively recover. In the face of these admitted facts the showing of a right to recovery fails. Neither the light of reason nor the logic of analysis of the undisputed facts of record can possibly justify the granting of a judgment favorable to these plaintiffs.

Plaintiffs start up a difficult mountain to a summit of sheer legalism. Somewhere amid the mists and clouds along the way the spirit of the law completely

disappears and its broken body lies in an unmarked spot under an avalanche of technical snow.

I cannot believe that any law can be as cold and lifeless as that. The law has for its primary purpose the ends of justice; otherwise it is as useless as a child trying to grasp a handful of sunlight. The law is a living thing, is not an end in itself but a means to an end. If it fails in this one thing it fails in everything.

To allow recovery in these cases would be to put a premium on dishonor and a penalty on courageous loyalty. We do not see how this court, or any court, can construe the law in such a fashion.

During the period involved here the defendant made certain payments for insurance and dependents. These were made largely for the benefit of the dependents of these soldiers and were not paid directly to the soldiers. The dependents in this record are not shown to have had any part in the actions of these unfortunate soldiers during the period involved here and are not parties to this suit. We do not believe that the ends of justice would be served by granting a judgment for the Government on its counterclaims.

The plaintiffs' petition and the defendant's counterclaims are dismissed in each of the cases.

It is so ordered.

LARAMORE, *Judge,* and WHITAKER, *Judge,* concur.

MADDEN, *Judge,* dissenting:

The statutes upon which the plaintiffs found their claims are 50 U.S.C. Appendix (1952 ed.) § 1002 and 10 U.S.C. (1952 ed.) § 846. The former statute says:

> Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered or besieged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence . . . .

The second statute cited above is to the same effect.

The plaintiffs, soldiers in the Korean War, were captured by North Korean or Chinese communist forces, two of them in 1950 and the third in 1951, and were prisoners until August 5, 1953, at which time the repatriation of prisoners following the Armistice began. The plaintiffs refused repatriation to the United States and elected to go to communist China. All three were dishonorably discharged from the Army on January 23, 1954. All three returned to the United States in July, 1955.

The plaintiffs have not been paid for the periods between the dates of their capture by the enemy and the date of their release from prison. They sue for that pay and point to the statutes. The statutes seem to say that they are entitled to their pay.

The Government says the statute should not be read as entitling them to their pay because the Army and this court have found as a fact that their conduct, while prisoners of war, was traitorous and contemptible.

No sophisticated person needs to be told that there is much that a court can do with the literal language of a statute in order to avoid an absurd result or to produce a just result or one consistent with an important policy. But the judicial rewriting of statutes ought to be indulged in with reluctance, and only when it is reasonably certain that the process will not do more harm than good, will not confuse the law rather than enlighten it.

The court, by adopting the Government's argument, has in effect placed in the disbursing officers of the Government the function of amending the statutes fixing the pay of military or civilian personnel on a *quantum meruit* basis. Both the military and civilian branches of Government service have their quotas of dead wood, and their quotas of persons of extraordinary value to the Government. Presumably, the paymasters may not pay the latter persons more than the statutes permit, but under today's decision it would seem that they may pay the former persons only what they are worth, which would be well below the statutory scale.

It will be said, of course, and truthfully said, that the conduct of the plaintiffs as prisoners of war was indecent and reprehensible. The Government says that they must not be "rewarded" for such conduct by getting the pay which the statutes provide for prisoners of war. There has never been a war in which some prisoners have not acted contemptibly, in comparison with the conduct of their better balanced comrades. In modern warfare, with its subtle brain-

washing techniques, one of the perils to badly balanced youths is the peril of being taken prisoner, of being persuaded to disloyal conduct, and of coming out of prison with their lives irreparably ruined. The amounts of pay here sued for by these plaintiffs would be a fabulous reward, indeed, for the tragic thing that happened to them in prison.

The statutes provide for the trial and punishment of soldiers for misconduct. If these men had been subjected to trial by a court-martial, or by a civilian court, the court would have considered their age, their upbringing, their mental qualities, the nature of the pressures to which they were exposed, and would have rendered an appropriate judgment. The judgment would not have included forfeiture of accrued pay. The Uniform Code of Military Justice, effective May 5, 1950, 64 Stat. 126, 50 U.S.C. § 638, provides that no forfeiture of pay and allowances shall extend to any pay or allowances accrued before the date when a court-martial sentence is approved by the convening authority.

It is noteworthy that after Congress abolished the historical power of courts-martial to forfeit accrued pay, the Army, apparently for the first time in history, forfeited the pay already accrued to these plaintiffs, not by the process of trial and sentence, which was forbidden by statute, but by the crude and primitive method of refusing to give them their money. Finding nothing in the law books to justify its refusal to pay these men, it threw the books away and just refused to pay them. It could have set before

these confused young men a better example of government by law.

Congress has never been willing to venture into the field of distinguishing, in its pay schedules between good soldiers and bad soldiers, or between bad soldiers and soldiers so bad that they are beneath contempt. I venture to predict that it will never do so, because the task would be impossible.

The plaintiffs have incurred the just condemnation of public opinion. The courts have nothing to do with that judgment. In court they are entitled to judgment according to law. I think that, according to law, they are entitled to their pay.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner C. Murray Bernhardt, and the briefs and argument of counsel, makes findings of fact as follows:

1. The plaintiffs, Otho G. Bell, William A. Cowart, and Lewie W. Griggs, were citizens of the United States at the time of their enlistments in the United States Army, and there is no evidence that their status as such has changed.

2. The plaintiffs, Bell, Cowart, and Griggs, enlisted in the United States Army on the respective dates of January 29, 1949, January 7, 1949, and August 4, 1949.

3. The plaintiffs, Bell, Cowart, and Griggs, were captured by the North Korean and/or Chinese com-

munist forces in Korea, along with other United States soldiers, on the respective dates of November 30, 1950, July 12, 1950, and April 25, 1951.

4. At the times of their capture as aforesaid the plaintiffs were privates first class in the United States Army.

5. Upon their capture as aforesaid the plaintiffs Bell and Griggs, were detained, respectively, in Prisoner of War Camp No. 5 located at Pyoktong, North Korea, and in Prisoner of War Camp No. 1. The record does not disclose the place of detention of the plaintiff Cowart.

ACTIVITIES OF PLAINTIFFS DURING DETENTION

6. The parties by their attorneys entered into a stipulation of record by the terms of which, for the purposes of this proceeding, certain facts were to be deemed to have been elicited from defendant's witnesses testifying under oath, without the necessity of calling such witnesses to trial. The plaintiffs did not rebut the facts so elicited and waived the right to testify or to call witnesses to testify in rebuttal of the said facts, although the plaintiffs did reserve the right to object to the materiality and relevancy of any of the facts. The facts so set forth in the stipulation related to the activities of the plaintiffs while they were detained as prisoners of war, and (as slightly modified) are provided in detail as to each plaintiff in succeeding findings 7 through 30.

7. During his confinement by enemy forces as aforesaid plaintiff Bell voluntarily served as a monitor in required squad study group meetings organized by the Chinese, beginning about January 1, 1951. These were also known as "forced study groups", which POW's were forced to attend under threat of duress. Armed guards were present at these sessions. The programs consisted of lectures depicting the derogatory aspects of life in the United States, and extolling the idyllic aspects of life under communism. As squad monitor, Bell procured communist propaganda literature from the enemy, distributed said writings among the squad members, and instructed them to read and discuss this literature. He threatened to turn in the names of any prisoners of war who refused to read or discuss favorably these communist propaganda handouts. In these forced attendance study group meetings he also lectured and led the discussions favorable to the communist cause and condemnatory of the United States, e.g., stating that the United States engaged in germ warfare, that the United States had caused the Korean war, that American forces had committed atrocities, that there were many more advantages about communism than about democracy. He voluntarily attended the special Voluntary Study Group maintained by the Chinese to indoctrinate the so-called "progressives", a term meaning POW's who consorted, fraternized and cooperated with their captors. He voluntarily joined the Peace Committee, whose members espoused commu-

nism through public address system broadcasts, and through distribution of propaganda articles and petitions.

8. Plaintiff Bell made tape recordings which were then broadcast over the Peiping radio and over the prison camp's public address system. He stated that the Chinese treatment of the prisoners of war was good, requested that his parents and relatives write President Truman to end the war and withdraw the Seventh Fleet from Formosa, said that the Korean war was senseless, avowed that on the orders of his platoon leader, his men killed North Korean prisoners of war, vilified President Truman as a warmonger, averred that life was better in China than in the United States, declared the American political parties were led by imperialists.

9. Plaintiff Bell participated in numerous communist propaganda activities. He wrote articles which appeared in the camp newspaper, *Towards Truth and Peace,* and in magazines entitled, *People's China,* and *China Monthly Review.* In these articles plaintiff alleged that American troops had committed atrocities against North Korean civilians and enemy soldiers and that he personally had been ordered to kill women and children and not to take prisoners. He ridiculed the American Army. He praised the good treatment accorded the prisoners of war by the Chinese. He wrote that the United States was unjustified in sending troops to Korea, and that he wanted to go to China to fight for peace and did not want to return to America. He urged the prisoners

of war to vow to fight for world peace on their return to the United States. He accused President Truman of forcing the United States into war and said that if given the opportunity he would run a tank over the President's body. Plaintiff Bell was paid money to write these articles. With the money he was paid to write these articles, he purchased candy and cigarettes in the Chinese Post Exchange in Pyoktong.

10. Plaintiff Bell was a member of the so-called "Wall Paper Committee" whose duties were to hang propaganda articles, pictures, cartoons and slogans on the camp bulletin board. He delivered lectures before his company and to the camp upon American aggression, and belittled America's economic and educational systems. He wrote letters to the United Nations in which he declared that American troops had committed atrocities against enemy civilians and soldiers, and that prisononers of war were receiving good treatment from their captors.

11. Plaintiff Bell drew cartoons and posters depicting American atrocities and use of germ warfare, which were pinned upon the camp bulletin boards and printed in the above-named publications. He drew up and signed peace petitions addressed to President Truman, the United Nations, to relatives of prisoners of war, and to peace organizations, e.g., Stockholm Peace Appeal, the Vienna Peace Conference, and the Asia and Pacific Peace Conference. Further, the Chinese made motion pictures of plaintiff as he signed the petition addressed to the Asia and Pacific Peace Conferende. He led a group of so-called progressives

in camp carrying banners depicting President Truman as a clown and slogans reading "Down with capitalists". Plaintiff Bell appeared in bi-monthly plays—one entitled "Golden Boy" depicting poverty and racial discrimination in the United States, and the other which he wrote was entitled "The Highest Stage of Capitalism" concerning the overthrow of the United States. He appeared voluntarily in a Chinese motion picture in which he portrayed an American rifleman captured by the communists. The motion picture depicted atrocities committed by American soldiers and the low morale of the American forces. He also signed surrender leaflets. He attempted to persuade and/or persuaded other prisoners of war to join the Voluntary Study Group and the Peace Committee. He also tried to persuade and/or persuaded other POW's to sign petitions, to follow and accept communistic theories, and to make recordings.

12. Plaintiff Bell made the following statements—that for every good point about the American Government, there were three good things about communism, that the South Koreans started the war and that it was like the Civil War in the United States, that American troops were tools and hatchet-men of American imperialists, that the United States and the United Nations had no right to be in the war, that the United States engaged in germ warfare, that if he were given a weapon he would fight against the United States and that he had attempted to join the Chinese Army but had been refused, that he would re-

turn from China in five years and would teach communism and help fight for communism, that the working people are slaves and cannon fodder for the capitalists, that he was not going to return to the United States and planned to renounce his citizenship and stay in China to fight for the peoples' side.

13. Plaintiff Bell wore the Chinese uniform, plus the Peace Dove Medal (given by the Chinese to show that the wearer was in sympathy with communism) and the Mao Tse Tsung medal (given by the Chinese to so-called "progressives") to identify them as communists and to reward them for their achievements and learning in communistic ideology. He consorted with the Chinese. He attended enemy parties held in Pyoktong. He visited the Chinese company and regimental headquarters in the prison camp frequently, in the day and at night. He took walks and talked with Chinese officers, inside and outside the camp. He was accorded special privileges by the Chinese, e.g., more and better food and drink, better medical treatment, freedom of the camp, lighter work details.

14. As squad leader in Camp No. 5, he sold food intended for the sick to other POW's at $5 a bowl. As monitor of the forced study group, he had food rations for some men cut down because they would not favorably discuss communism, and threatened to turn in the names of men who did not study the communistic literature. He informed on other POW's. As monitor of the forced study group, he would inform the Chinese if a squad member refused to read re-

quired propaganda literature, or failed to voice a procommunist opinion in the discussion periods. He told the Chinese that a certain POW was planning to escape and, as a result, the POW was placed in solitary confinement. He told the Chinese that he and others in his outfit had killed Chinese POW's and this falsification caused the Chinese to attempt to pressure another POW into writing a story about these atrocities. He told the Chinese that the 2d Infantry Division massacred South Korean civilians. A United States POW was interrogated as a result of plaintiff's written statement to the Chinese that American troops herded communist POW's on a ship and injected poison gas into their blood, that the American Air Force bombed women and children, and that he saw an American lieutenant and enlisted men rape a Korean woman.

15. Plaintiff Bell turned in names to the Chinese of POW's whom he had ordered to obtain their rations, but who had been too ill to obey. He reported a POW who had refused to fall out for exercise, who was therefore sentenced to 15 days at hard labor with his rations cut to one meal a day. He informed on POW's who stole wood from the Chinese. He also informed the Chinese that POW's had stolen food for which acts they were put into solitary confinement. As a result of plaintiff's relation to the Chinese, a POW had a fight with another POW and one of them was placed in solitary. Because he reported to the Chinese that certain POW's had criticized him, these POW's were made to stand outdoors in the

sun all day and were sentenced to hard labor. He reported to the Chinese the name of a POW who planned to escape, and the latter was placed in "the hole"[4] where he died. Because he gave the names to the Chinese of POW's who participated in a sit-down strike, one of the men was bayonetted and the rest were placed in solitary. A POW was forced to stand in an icy river because plaintiff told the Chinese that the former had "talked back" to him.

16. The Korean armistice was signed July 27, 1953, and prisoner repatriation began August 5, 1953, at Panmunjon. Plaintiff Bell refused repatriation and voluntarily elected to go to communist China. After going to communist China, he attended the Ideological Reformation School in Taiyuan, China, where communist ideology was taught, for seven months. He was assigned to a machine center on a collective farm in the Yellow River Valley, China, where he worked until his return to the United States. On January 23, 1954, plaintiff Bell was dishonorably discharged from the United States Army. He returned to the United States in July 1955.

WILLIAM A. COWART

17. During his confinement by enemy forces as aforesaid plaintiff Cowart stole food from other POW's in the North Korean prison camps. He visited the headquarters of the North Korean forces frequently, and conversed with Korean officers and Rus-

[4]The "hole" was a damp hole in the earth of dimensions which did not permit the occupant to stand, sit, or lie down. It was covered by a tin roof and lacked sanitation facilities.

sian civilians there. He told the North Korean captors that two fellow POW's had beaten him for stealing their food. He informed a North Korean colonel that the POW's had disobeyed orders by giving prisoners too ill to work full rations rather than half rations. He informed North Korean captors that a POW had stolen foodstuffs and that a POW was planning to escape. He signed a petition calling on the United Nations forces to lay down their arms. He received extra tobacco rations from the North Korean guards and was given light work details.

18. Subsequent to October 19, 1951, plaintiff Cowart was transferred to Chinese Prisoner of War Camp No. 3. He was a monitor of the forced study group there, and was a member of the Voluntary Study Group attended by all so-called "progressives" for the purpose of communistic indoctrination. He influenced or attempted to influence other POW's to join the Voluntary Study Group and to believe in the communistic dogma. He made tape recordings which were later broadcast over Peiping radio and over the camp public address system. He therein broadcast about the good treatment accorded to POW's by the Chinese. He urged that America end the war and the American Government be petitioned to end the war. He declared that the Korean war was useless, that American soldiers were being cheated by the capitalists and warmongers of Wall Street, and that America should cooperate with the Chinese.

19. Plaintiff Cowart was a member of the Peace Committee which drew up, signed and circulated peace

petitions. He wrote propaganda articles which appeared in *Towards Truth And Peace* and in the *China Monthly Review.* He wrote that American soldiers committed atrocities, that Americans used germ warfare, that the Chinese had a better educational system than the United States in that in America only the wealthy could obtain an education, that the United States used germ warfare, that the American people had been misled and that the United States was waging an aggressive war. He reviewed the communist books he had read. He drew propaganda posters and cartoons, depicting capitalists living off the masses, Uncle Sam hanging from a tree or lying in a coffin with the words written "For Peace and Against American Aggression" and "Down With War Mongers", depicting Uncle Sam carrying a bomb, and Uncle Sam on his knees before a Chinese soldier armed with a bayonet.

20. Plaintiff Cowart acted in several camp plays. One play mocked the various United Nations. Other plays depicted that the use of a germ warfare bomb and the use of an atomic bomb benefited capitalists, that civilians were being coerced to join the American Army. In another play, he portrayed an American POW who was being treated well by the Chinese while other American soldiers were stupidly fighting in foxholes. Another play satirized President Truman and General Ridgway, at the end of which the actors, including Cowart, said "Down With the United States."

21. Plaintiff Cowart wore a Chinese uniform, the Peace Dove Medal and the Stalin Badge. He informed

on POW infractions or actions, for which they were later punished. He reported to the Chinese that POW's had stolen food from the Chinese warehouse, that certain POW's made anti-communist remarks, that he (Cowart) had been beaten by POW's, that certain POW's were either not studying the propaganda given to them or were not giving the correct answers in the forced study group meetings, that a POW was planning to escape, that certain POW's had torn up slogans and pictures in the progressives' Study Club Room.

22. Plaintiff Cowart consorted with the Chinese running the prisoner of war camp, attended Chinese parties, walked and talked with Chinese officers, guards and interpreters, and lived for some time at the Chinese regimental headquarters. He was given special privileges, e.g., better rations, quarters, no work details, and was allowed to make purchases at the Chinese Post Exchange in Pyong-yang.

23. Plaintiff Cowart stated that he believed in communism, that any thinking person would adopt communism, that he hated America, that its Government should be overthrown, that he desired to study in China and return to the United States in five years to help in the overthrow of the Government, which was inevitable, that the American Government was fascistic, similar to the German Government. He wrote a letter to Mao Tse Tsung in which he stated his belief in communism, criticized the American economic and educational systems, asked for the opportunity to study in China and join the communist party.

and gave thanks for the kind treatment accorded him by the Chinese.

24. The Korean armistice was signed July 27, 1953, and prisoner repatriation began August 5, 1953, at Panmunjon. Plaintiff Cowart refused repatriation and voluntarily elected to go to communist China. After going to communist China he voluntarily attended a communist indoctrination school at Taiyuan, China, where communist ideology was taught, for seven months. On January 23, 1954, plaintiff Cowart was dishonorably discharged from the United States Army. In July 1955, he returned to the United States.

LEWIE W. GRIGGS

25. During his confinement by enemy forces as aforesaid plaintiff Griggs was a monitor in the forced study group meetings in the prisoner of war camp wherein he led the discussions after he had lectured on communism. He was also a member of the Voluntary Study Group which he attended regularly with other so-called "progressives". He was a member of the Peace Committee which drew up, signed and circulated peace petitions. He attempted to influence and persuade POW's to join the Voluntary Study Group and Peace Committee, to sign petitions, and to follow communistic doctrines. He wore a Peace Dove Medal, and also wore a black arm band at Stalin's death. As a member of the Permanent Peace Committee he wore a cloth inscribed with Chinese writing on his chest.

26. Plaintiff Griggs was a member of a Kangaroo Court invoking punishment on POW's for infractors.

He appeared as a witness against a POW and signed his name to the charges. A POW, after being released from a cellar by the Chinese, was returned to the cellar at the suggestion of the Peace Committee on which plaintiff Griggs served. He recommended to the Chinese various punishments to be meted out to POW's for breaking rules, while other squad members stated that nothing should be done. He informed on POW's. He revealed names to the Chinese of POW's who led a mass exodus from a communist entertainment show. He disclosed to the Chinese the name of a POW who had planned to escape. As monitor, he disclosed the names of those who criticized communism or refused to study communistic literature, and revealed the names of POW's who had stolen food and tobacco from the Chinese warehouse.

27. Plaintiff Griggs made recordings for the Chinese radio, which were also sent out over the camp public address system. Roundtable discussions of the so-called "progressives", in which plaintiff participated, were recorded and broadcast. He spoke over the camp public address system. The subjects of these recordings and broadcasts were, that atrocities had been committed by American troops, that the American Government should be overthrown, that the Korean war was the fault of the United States. One of the recordings, which was directed to plaintiff's mother and played back over the public address system, requested that his mother join organizations for peace and persuade President Truman to withdraw troops from Korea. As a member of the Peace Committee, he drew up, signed and circulated peace peti-

tions which urged the cessation of war and the use of bombs and germ warfare by the United States. He signed surrender leaflets and letters addressed to his friends which were dropped behind United Nations lines. These letters and leaflets urged surrender and described the good treatment provided by the Chinese.

28. Plaintiff Griggs wrote propaganda articles, to which he signed his own name or unauthorizedly signed the name of another POW. These articles were published in *Towards Truth and Peace* and in other camp publications. In these articles he urged that the United States should cease fighting, declared that the United States used germ warfare and committed atrocities, and stated that the Chinese were good friends. He delivered speeches to groups of POW's to the effect that he and a committee had read confessions of American Air Force officers as to the use of bacteriological warfare and that he (Griggs) believed the confessions. He wrote letters to various groups and individuals in the United States urging them to write to the Government requesting peace. He uttered pro-communist and anti-American statements, e.g., that the United States was the aggressor, a warmonger, that American capitalists in control of the Government started the Korean war, that if he were given a weapon he would fight the United Nations forces, that the United States used germ warfare, that the study of communism was beginning to make sense to him, that he believed in communism, that the Chinese were right in embracing communism, that when he returned to the United States it would

be communistic and he would be a hero, that the whole world would be dominated by communism in ten years and that individuals similar to him would be leaders, that he would join the communist party when he returned to the United States, that he would sell out the United States for a tailor-made cigarette.

29. Plaintiff Griggs consorted with the Chinese in the prisoner of war camp, attended enemy parties, visited Chinese headquarters frequently, walked and talked with enemy officers and interpreters, and called or referred to the Chinese as "comrades". He was accorded special privileges in that he received better food, drink, medical treatment, had freedom of the camp and did not have to go out on work details.

30. The Korean armistice was signed July 27, 1953, and prisoner repatriation began August 5, 1953, at Panmunjon. Plaintiff refused repatriation and voluntarily elected to go to communist China. He signed letters prepared by the Chinese addressed to the families of Edward Dickenson and Claude Dickenson. In these letters plaintiff declared the imprisonment of these two men was unjust. He attended a communist indoctrination school at Taiyuan, China, for six months. He was assigned to a state farm in the Yellow River Valley, China, and later was transferred to a factory at Kaifeng until his return to the United States. On January 23, 1954, plaintiff Griggs was dishonorably discharged from the United States Army. He returned to the United States in July 1955. On his return he stated that he returned to the United States because China was a slave state

and because having a job, going to school, taking vacations and having a family and hobbies were practically out of reach in China.

GENERAL

31. With reference to the plaintiffs' assertions while confined as POW's that the United States engaged in germ warfare in Korea, as related in findings 7, 11, 12, 19, 20, 27 and 28, *supra,* at trial the plaintiffs' counsel stipulated that neither the United States nor any of the United Nations forces engaged in germ warfare in Korea. The defendant produced as witnesses certain Army staff officers who testified authoritatively that the United States did not authorize the use of germ warfare in Korea, did not ship any materials or equipment to Korea for that purpose, and received no requests for such materials or equipment, although the defendant conceded that at all relevant times the United States possessed in the United States a military potential to wage germ warfare. In view of the concession by plaintiffs' counsel that the United States did not use germ warfare in Korea, the commissioner sustained plaintiffs' objection to the defendant's testimony but permitted it to remain in the record as defendant's offer of proof under Rule 41(c). The plaintiffs endeavored, without success and only through the medium of cross-examining defendant's witnesses, to establish that they originally had reasonable grounds to believe that their statements as to germ warfare while POW's were true when made.

32. With reference to plaintiff Bell's statement to the Chinese that American troops had injected poison gas into the blood of communist POW's on a ship (finding 14, *supra*), plaintiffs' counsel stipulated at trial that this had not been done.

33. With reference to the plaintiffs' assertions while confined as POW's that conditions in the POW camps in North Korea where captured Americans and their allies were confined were good, plaintiffs' counsel stipulated that such conditions were not good. The defendant established by affirmative proof that conditions in the communist POW camps in North Korea were so grossly inadequate as to food, clothing, sanitation, shelter, and medical care that the death rate of POW's was nearly 40 percent in certain camps.

DAMAGES

34. After each plaintiff was captured and before each plaintiff refused repatriation and elected to go to communist China, the Department of the Army took routine administrative action to reflect a change in each plaintiff's records to show them as Corporals as of May 1, 1953. None of the plaintiffs has received any pay for the period from the date he was captured to January 23, 1954, the date each was dishonorably discharged, except amounts advanced by the Army for insurance and allotments for the dependents of each plaintiff. It was stipulated by the parties that, if this court decides that the plaintiffs, or any of them, are entitled to recover as a matter of law, the net amount

of damage suffered by each plaintiff by reason of the allegations in the petition is as follows:

Otho G. Bell	$1,455.29
William A. Cowart	4,991.13
Lewie W. Griggs	2,810.14

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are not entitled to recover, and the petition therefore is dismissed.

The court further concludes as a matter of law that the defendant is not entitled to recover of and from the plaintiffs on its counterclaims, and the counterclaims are therefore dismissed.

Appendix B

10 U.S.C. § 846 (1952) provides as follows:

"Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled, while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such malitia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law. (R.S. § 1288.)"

Appendix C

50 U.S.C. App. § 1002 (1952) provides as follows:

"Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered or besieged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled thereafter, and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]: *Provided,* That such entitlement to pay and allowances shall not terminate upon expiration of term of service during absence and in case of death during absence shall not terminate earlier than the dates herein prescribed: *Provided further,* That there shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period."

50 U.S.C. App. § 1006 (1952) provides as follows:

"When it is officially reported by the head of the department concerned that a person missing under

the conditions specified in section 2 of this Act [section 1002 of this Appendix] is alive and in the hands of a hostile force or is interned in a foreign country, the payments authorized by section 3 of this Act [section 1003 of this Appendix] are, subject to the provisions of section 2 of this Act [section 1002 of this Appendix], authorized to be made for a period not to extend beyond the date of the receipt by the head of the department concerned of evidence that the missing person is dead or has returned to the controllable jurisdiction of the department concerned. When a person missing or missing in action is continued in a missing status under section 5 of this Act [section 1005 of this Appendix], such person shall continue to be entitled to have pay and allowances credited as provided in section 2 of this Act [section 1002 of this Appendix] and payments of allotments, as provided in section 3 of this Act [section 1003 of this Appendix], are authorized to be continued, increased, or initiated."

50 U.S.C. App. § 1009 (1952) provides as follows:

"The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001-1012 and 1013-1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential date including that upon which evidence or information is received in such department

or by the head thereof. The determination of the head of the department concerned, or of such subordinate as he may designate, shall be conclusive as to whether information received concerning any person is to be construed and acted upon as an official report of death. When any information deemed to establish conclusively the death of any person is received in the department concerned, action shall be taken thereon as an official report of death, notwithstanding any prior action relating to death or other status of such person. If the twelve months' absence prescribed in section 5 of this Act [section 1005 of this Appendix] has expired, a finding of death shall be made whenever information received, or a lapse of time without information, shall be deemed to establish a reasonable presumption that any person in a missing or other status is no longer alive. Payment or settlement of an account made pursuant to a report, determination, or finding of death shall not be recovered or reopened by reason of a subsequent report or determination which fixes a date of death except that an account shall be reopened and settled upon the basis of any date of death so fixed which is later than that used as a basis for prior settlement. Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act [sections 1001-1012 and 1013-1016 of this Appendix], to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: *Provided*,

That no such account shall be charged or debited with any amount that any person in the hands of a hostile force may receive or be entitled to receive from, or have placed to his credit by, such hostile force as pay, wages, allowances, or other compensation: *Provided further,* That where the account of any person has been charged or debited with allotments paid pursuant to this Act [said sections] any amount so charged or debited shall be recredited to such person's account in any case in which it is determined by the head of the department concerned, or such subordinate as he may designate, that payment of such amount was induced by fraud or misrepresentation to which such person was not a party. When circumstances warrant reconsideration of any determination authorized to be made by this Act [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. Excepting allotments for unearned insurance premiums, any allotments paid from pay and allowances of any person for the period of the person's entitlement under the provisions of section 2 of this Act [section 1002 of this Appendix] to receive or have credited such pay and allowances shall not be subject to collection from the allottee as overpayments when payment thereof has been occasioned by delay in receipt of evidence of death, and any allotment payments for periods subsequent to the termination, under this Act [sections 1001-1012 and 1013-1016 of this Appendix] or otherwise, of entitlement to pay and allowances, the payment of which has been oc-

casioned by delay in receipt of evidence of death, shall not be subject to collection from the allottee or charged against the pay of the deceased person. The head of the department concerned, or such subordinate as he may designate, may waive the recovery of erroneous payments or overpayments of allotments to dependents when recovery is deemed to be against equity and good conscience. In the settlement of the accounts of any disbursing officer credit shall be allowed for any erroneous payment or overpayment made by him in carrying out the provisions of this Act [sections 1001-1012 and 1013-1016 of this Appendix], except sections 13, 16, 17, and 18 [sections 1013 and 1016, and former sections 1017, 1018 of this Appendix], in the absence of fraud or criminality on the part of the disbursing officer involved, and no recovery shall be made from any officer or employee authorizing any payment under such provisions in the absence of fraud or criminality on his part."

No. ~~942~~ 92

In the Supreme Court of the United States

OCTOBER TERM, 1959

OTHO G. BELL, WILLIAM A. COWART, AND LEWIE W. GRIGGS, PETITIONERS

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	4
Argument	8
Conclusion	13

CITATIONS

Cases:

United States v. *Batchelor*, 7 USCMA 354, 22 CMR 144 — 9

United States v. *Dickenson*, 6 USCMA 438, 20 CMR 154 — 9

United States v. *Kingsley*, 138 U.S. 87 — 12

United States v. *Landers*, 92 U.S. 77 — 8

Statutes:

Missing Persons Act (56 Stat. 143), as amended, 50 U.S.C. App. (1952 ed.) 1001 et seq.:

Section 1001 — 2, 9

Section 1002 — 2, 9, 10

Section 1009 — 3, 10, 11

28 U.S.C. 1346(d) — 8

37 U.S.C. 33(b) — 12

50 U.S.C. (1952 ed.) 638 — 12

R.S. 1288 (37 U.S.C. 242, formerly 10 U.S.C. (1952 ed.) 846) — 4, 10, 11

Art. 104, Uniform Code of Military Justice, 50 U.S.C. (1952 ed.) 698 — 9

Art. 105, Uniform Code of Military Justice, 50 U.S.C. (1952 ed.) 699 — 9

554117—60

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v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1–17) is reported at 181 F. Supp. 668.

JURISDICTION

The judgment of the Court of Claims was entered on March 2, 1960. The petition for a writ of certiorari was filed on May 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioners, captured American soldiers who voluntarily served the enemy during the Korean hostilities and subsequently refused repatriation to

this country, are entitled to pay and allowances for the period between their capture by the enemy forces and their discharge from the army.

STATUTES INVOLVED

The Missing Persons Act (56 Stat. 143), as amended, 50 U.S.C. App. (1952 ed.) 1001 *et seq.*, provides in pertinent part (as it appeared in the United States Code):

§ 1001. *Definitions*

For the purpose of this Act [sections 1001–1016 of this Appendix]—

* * * * *

(b) the term "active service" means active service in the Army, Navy, Marine Corps, and Coast Guard of the United States, including active Federal service performed by personnel of the retired and reserve components of these forces, the Coast and Geodetic Survey, the Public Health Service, and active Federal service performed by the civilian officers and employees defined in paragraph (a)(3) above;

§ 1002. *Missing, interned, or captive persons; continuance of pay and allowances*

Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered or besieged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled thereafter,

and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]: *Provided,* That such entitlement to pay and allowances shall not terminate upon expiration of term of service during absence and in case of death during absence shall not terminate earlier than the dates herein prescribed: *Provided further,* That there shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period.

§ 1009. *Determinations by department heads or designees; conclusiveness relative to status of personnel, payments, or death*

The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001–1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. * * * When circumstances warrant reconsideration of any determination authorized to be made by this Act

> [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination.

R.S. 1288 (37 U.S.C. 242, formerly 10 U.S.C. (1952 ed.) 846) provides:

> Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law.

STATEMENT

Petitioners enlisted in the army in 1949. During the Korean conflict, they were captured and detained by North Korean and Chinese Communist forces (Findings 2 and 3; Pet. App. 18–19). The unchallenged findings of the court below are that during the period of their detention petitioners voluntarily and actively served the enemy. In the prisoner of war camps to which they were assigned, they acted as squad monitors or leaders; in that capacity, they procured communist propaganda, and forced the other American prisoners to read it and comment favorably upon it. If the other prisoners refused to comply,

petitioners reported their names and they thereafter received smaller food rations or were otherwise punished. Upon the recommendations of petitioners, prisoners who disobeyed, criticized or talked back to petitioners were punished, *e.g.*, by hard labor, reduced rations, or by being forced to stand all day in the sun or in an icy river (Findings 7, 14, 15, 21, 25, 26; Pet. App. 20, 24–25, 26, 28–29, 30–31).

Petitioners also acted as the enemy's informers within the prison camps. They gave the Chinese the names of other prisoners who planned to escape or otherwise resisted the enemy. As a result, American prisoners were placed in solitary confinement, bayonetted, and punished in other ways (Findings 15, 21, 26; Pet. App. 25–26, 28–29, 31). At least one prisoner died as a direct result of such a report by petitioner Bell (Finding 15; Pet. App. 26).

Petitioners also engaged in extensive propaganda activities for the enemy, both within and without the camps. They wrote articles for enemy newspapers and magazines, delivered lectures, drew cartoons and posters, took roles in plays and moving pictures, signed and circulated petitions and letters, and made recordings for radio broadcasts. This propaganda, designed to assist the enemy's prosecution of the hostilities, generally condemned the United States and its government, while extolling the virtues of communism and the communist countries. Petitioners depicted the United States as an aggressor, described atrocities which they falsely said they saw American soldiers commit, and falsely described the conditions of the American prisoners of war as good. They testified to

the use of germ warfare by the United States and, describing the American system of government as "fascistic", declared that life was better in China than in the United States (Findings 8, 9, 10, 11, 14, 19, 20, 27, 28; Pet. App. 21–23, 25, 28, 31–32).

During their detention, petitioners mixed socially with enemy troops. They attended parties, visited Chinese company and regimental headquarters frequently, and circulated with the Chinese officers, both inside and outside the prison camp. Petitioner Cowart lived in the Chinese regimental headquarters for some time (Findings 13, 22, 29; Pet. App. 24, 29, 33).

Each of the petitioners declared his hostility to the United States and pledged his adherence to the cause of the enemy. Petitioner Griggs wore a Chinese medal; Bell and Cowart wore the Chinese uniform and Chinese medals (Findings 25, 13, 21; Pet. App. 30, 24, 28–29). Bell stated that he wished to fight for China and against the United States, and had attempted to join the Chinese Army (Finding 12; Pet. App. 23–24). Cowart stated that he wished to study in China and then return to the United States to help in the overthrow of the American government (Finding 23; Pet. App. 29). Griggs stated that, if given a weapon, he would fight the forces of the United Nations in Korea, and expressed the willingness to "sell out" the United States for "a tailor-made cigarette" (Finding 28; Pet. App. 32–33). Each of the petitioners confirmed this renunciation of his allegiance to the United States by refusing repatriation

when it was offered after the signing of the Korean armistice, and electing to go to communist China.

Petitioners were administratively discharged from the United States Army in January 1954 (Findings 16, 24, 30; Pet. App. 26, 30, 33). They returned to the United States in July 1955. On November 8, 1955, they filed claims with the Department of the Army requesting pay and allowances from the date of their capture until the date of their discharge. Their claims were denied on October 2, 1956, and on December 31, 1956, petitioners brought suit in the Court of Claims for pay and allowances from capture to discharge.[1]

In the court below, petitioners introduced no evidence, did not testify, and stipulated the facts summarized above pertaining to their conduct during the period involved. The Government offered testimony to prove the falsity of some of the propaganda charges pertaining to "germ warfare" and other alleged American misconduct, but petitioners agreed that the charges were false. The parties also stipulated that the net amounts due to petitioners, should their claims be allowed, would be as follows: Bell, $1,455.29; Cowart, $4,991.13; Griggs, $2,810.44.

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[1] Petitioners now state that they seek pay which accrued prior to their capture (Pet. 21). However, their claims filed with the army, and their petition to the Court of Claims, did not request or mention pre-capture pay (petition in the Court of Claims, paras. III, VII, and X). The court below did not mention the issue of pre-capture pay because the issue was never before it.

ARGUMENT

This case presents a relatively narrow and presumably non-recurrent question of statutory construction; there is, and can be, no conflict of decisions between lower courts [1]; and the Court of Claims below correctly determined that Congress did not intend that captured soldiers be paid for a period in which they were willingly serving the enemy. There is no occasion for review by this Court.

1. To the best of our knowledge, this case is the first in the history of this country in which captured American soldiers have served an enemy of the United States and then sued for pay from the United States for the period in which they were doing so. Moreover, there are no other claims of this kind arising out of the Korean conflict; and there is no prospect of similar claims in the foreseeable future.

2. Absent a statute which entitles them to pay, petitioners clearly have no right to pay for the period for which they sue. As this Court has held, a soldier who criminally breaks his contractual obligation of faithful service to the United States is not entitled—absent some governing legislation—to any pay for the period of his enlistment. *United States* v. *Landers*, 92 U.S. 77. Petitioners' conduct unquestionably constituted criminal breach of their obligations to render faithful service to the United States. The record leaves no doubt that petitioners gave aid and comfort

[1] Pay claims are within the exclusive jurisdiction of the Court of Claims. 28 U.S.C. 1346(d).

to the enemy,[3] which is the military equivalent of treason.

3. The Missing Persons Act (50 U.S.C. App. (1952 ed.) 1001 *et seq.*) upon which petitioners rely, contains nothing to indicate a Congressional purpose to pay soldiers for a period during which they voluntarily serve the enemy. The Act provides that a person "in active service * * * who is officially determined to be absent in a status of * * * captured by a hostile force" is entitled to pay and allowances. 10 U.S.C. App. (1952 ed.) 1002, *supra*, pp. 2–3. The term "active service" is defined to mean "active service in the Army * * * of the United States." 10 U.S.C. App. (1952 ed.) 1001, *supra*; p. 2. Since petitioners were found to be in the service of the enemy, they lost their status as persons "in active service in the Army * * * of the United States * * * captured by a hostile force."[4] That Congress did not intend soldiers in petitioners' position to receive pay is also reflected by the provision in the Missing Persons Act to the effect that deserters and others

[3] See Art. 104 of the Uniform Code of Military Justice, 50 U.S.C. (1952 ed.) 698; *United States* v. *Dickenson*, 6 USCMA 438, 20 CMR 154; *United States* v. *Batchelor*, 7 USCMA 354, 22 CMR 144; see, also, Art. 105 of the Code, 50 U.S.C. (1952 ed.) 699.

[4] Petitioners contend that the United States in its answer in the court below admitted that they were in the active service of the Army of the United States. No such admission was made, however, and the United States denied that petitioners were in the U.S. Army (para. V of the answer). The routine administrative action promoting petitioners to corporal, taken in ignorance of petitioners' service to the enemy, did not affect petitioners' status, and did not bind the United States (see p. 11, *infra*).

absent without authority shall not be entitled to pay. 50 U.S.C. App. (1952 ed.) 1002, *supra*, p. 3. Desertion merely results in a failure of the soldier to serve his country. But when petitioners entered into the service of the enemy, not only did the United States lose their services, but the enemy acquired additional strength, to the detriment of the United States and their fellow prisoners who remained loyal. Indeed, while petitioners did not bear arms against the United States, it was apparently only because the enemy determined that petitioners would be more useful to its cause as propagandists, informers, and camp guards than as fighting soldiers.[5] It would be most strange to ascribe to Congress the belief that soldiers who have engaged in such activities should receive more favorable treatment than mere absentees.[6]

Petitioners' reliance (Pet. 10, 16) upon R.S. 1288, *supra*, p. 4,[7] concerning the pay of captured soldiers, is misplaced. The Missing Persons Act, which was

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[5] Petitioners Bell and Griggs explicitly stated their willingness and desire to fight for the Chinese Communists against the United States and her allies (Findings 12, 28; Pet. App. 23–24, 32–33). Petitioner Cowart, who wore the uniform of the Chinese Communists, stated that he hated America and wished "to help in the overthrow of the [American] Government" (Finding 23; Pet. App. 29).

[6] The Act provides that the determination of the head of a department as to the serviceman's status under the Act shall be conclusive. 10 U.S.C. App. (1952 ed.) 1009, *supra*, pp. 3–4. Since petitioners do not come within the terms of the Act, we need not discuss the effect of the army's administrative determination that petitioners were not in a status which gave them a right to pay. However, we reserve the right to raise that issue as a defense against petitioners' claims, if certiorari is granted.

[7] 37 U.S.C. 242 (formerly 10 U.S.C. (1952 ed.) 846).

passed in 1942, provides for pay and allowances of servicemen who are captured, as well as for those who are missing, interned in a foreign country, or beleagured or besieged. Any inconsistency between the two statutes should be resolved in favor of the Missing Persons Act. In any event, R.S. 1288 cannot be read as giving petitioners a right to the pay in question. It provides that when an army enlisted man is captured he shall be entitled to receive "during his captivity" the same pay which he would receive "while in the actual service of the United States." Petitioners are in no position to assert that they were in captivity, since they served the enemy voluntarily and refused to accept repatriation to the United States at the conclusion of hostilities.

4. Petitioners also contend that they are entitled to pay because the army carried them on its rolls until January 23, 1954 (Pet. 16–17). However, the Missing Persons Act specifically authorizes the army to "change or modify a previous determination" as to status under the Act "when circumstances warrant reconsideration." 50 U.S.C. App. (1952 ed.) 1009, *supra*, pp. 3–4. The army later determined that petitioners were not in a status during the critical period which entitled them to pay for that time. The United States is therefore not bound by prior determinations of status made by the army in ignorance of the petitioners' service to the enemy.

5. Judge Madden, in his dissenting opinion below, suggests that a court-martial or criminal prosecution in a civilian court would have been more appropriate in this case than the procedure actually followed. Yet

the Court of Claims is as well equipped to consider the petitioners' "age, their upbringing, their mental qualities, the nature of the pressures to which they were exposed" (Pet. App. 17) as a court-martial[8] or some other civilian court. Petitioners, acting through counsel of their own choice, decided not to introduce evidence concerning those matters and the record in this case does not bear out Judge Madden's conjecture (Pet. App. 16–17) that petitioners might have been subject to "subtle brainwashing techniques" or other "pressures."

The dissent also expressed the view (Pet. App. 17) that the army had "forfeited the pay already accrued * * *" to the petitioners, in spite of a provision in the Uniform Code of Military Justice which withdrew from courts-martial the authority to forfeit pay and allowances already accrued. 50 U.S.C. (1952 ed.) 638. There was, however, no forfeiture of accrued pay in the present case. The army determined that the petitioners had no right to pay for the period following capture, and it is the initial right to pay—not a forfeiture of pay admittedly once due—which is the subject matter of this litigation.[9] Nor is there anything particularly "crude and primitive" (Pet. App. 17) in refusing to pay the petitioners money to which they

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[8] The attempt to try petitioners for their crimes by court-martial failed since they returned to this country after their administrative discharge from the army (Pet. 4–5).

[9] Similarly, a deserter has no right to pay for the period following his desertion, and a court-martial sentence is not a prerequisite for refusal to pay. 37 U.S.C. 33(b); *United States* v. *Kingsley*, 138 U.S. 87.

have no right. The United States does not normally pay legal claims which it believes invalid, any more than private individuals do.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1960.

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In the Supreme Court

of the

United States

October Term, 1939

No. 92

Otho G. Bell (1), William A. Coward (2), Lewis W. Green (3), *Petitioners,*	
vs.	
The United States, *Respondent.*	

BRIEF FOR PETITIONERS.

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Subject Index

	Page
Opinion below	1
Jurisdictional statement	1
Statutes involved	2
Specification of error	2
Questions presented	3
Statement of case	3
Argument	6
Is a serviceman's conduct relative and material to his entitlement to pay under a specific pay statute?	10
The statute and its predecessors	17
Statutory construction	18
An analysis of the lower court's opinion	22
1. Administrative forfeiture	22
2. Unconstitutional forfeiture	24
3. Retroactive forfeiture	25
4. Burden of proof	26
5. Standard of care	28
6. Conclusive administrative determination	30
Effect on future servicemen	31
Conclusion	33

Table of Authorities Cited

Cases

	Pages
Carter's Heirs v. Cutting, 12 U.S. 250	21
F. de Carrington v. The United States, 46 Ct. Cl. 279	23
Ex Rel. Hirshberg v. Cooke, 336 U.S. 210	17
Fullinwider v. Southern Pacific Railroad Company, 248 U.S. 409	20
In re Grimley, 137 U.S. 147	9
In re Marrissey, 137 U.S. 157	9
Kansella v. Drueger, 354 U.S. 1	26
Lewis v. The United States, 92 U.S. 618	19
Petition of Provo, 17 F.R.D. 183, 350 U.S. 857	17
Reid v. Covert, 354 U.S. 1	5, 26
Toth v. Quarles, 350 U.S. 11	5, 26
U. S. v. Batchelor, 19 C.M.R. 452	29
U. S. v. Bayer, 22 C.M.R. 487	29
U. S. v. Blanton, 7 U.S.C.M.A. 664, 23 C.M.R. 128	9
U. S. v. Chase, 135 U.S. 255	21
U. S. v. Dickenson, 17 C.M.R. 438	29
U. S. Ex Rel. Innes v. Hiatt, 141 F.2d 664	24
U. S. v. Gallagher, 21 C.M.R. 435	29
U. S. v. Major Ronald E. Alley, 25 C.M.R. 63	29
U. S. v. Lt. Col. Harry Fleming, 19 C.M.R. 438	29
U. S. v. Olson, 20 C.M.R. 461	29
U. S. v. Reese, 92 U.S. 214	19
Walsh v. The United States, 43 Ct. Cl. 25	23
White v. United States (1931), 72 Ct. Cl. 459	9, 18, 29, 33

Rules

Rules of the Supreme Court of the United States relating to certiorari, Rule 23 (28 U.S.C. Rule 23)	2

Statutes

	Pages
Act of February 13, 1925, Section 3(b)	1
Act of May 22, 1939, 62 Stat. 928 (28 U.S.C. 1255)	2
3 Stat. L. 114, Section 14	17
Uniform Code of Military Justice, effective June 5, 1950, 64 Stat. 126, 50 U.S.C. 638	24
Uniform Code of Military Justice, 1951, 64 Stat. 126, 50 U.S.C. 698	9
Uniform Code of Military Justice, Article 104	26
10 U.S.C. 486	18
10 U.S.C. 846	2, 10, 17, 18, 19, 20, 22, 23, 31, 32
18 U.S.C. 2381	27
18 U.S.C. 2387	27
18 U.S.C. 2388	27
18 U.S.C. 3238	27
50 U.S.C., Appendix 1002-1009, the so-called Missing Persons Act	2, 17, 23
50 U.S.C., Appendix 1002	2, 23
50 U.S.C. App. 1009	31

Texts

Facts on File, 1955, page 191	30
Statutory Construction, Crawford Law Book Co., 1940, page 195	19
U. S. News and World Report, February 24, 1956	29

In the Supreme Court
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vs.

THE UNITED STATES,
Respondents.

BRIEF FOR PETITIONERS.

OPINION BELOW.

The Opinion and Findings of Fact of the United States Court of Claims, filed March 2, 1960, is found in the record at pages 33 to 59.

JURISDICTIONAL STATEMENT.

This appeal is taken from a judgment of the United States Court of Claims entered on March 2, 1960. Jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended

by the Act of May 22, 1939, 62 Stat. 928 (28 U.S.C. 1255). Rules of Review by this Court of the judgments of the Court of Claims by certiorari, are provided for in Rule 23 of the Rules of the Supreme Court of the United States relating to certiorari (28 U.S.C. Rule 23).

STATUTES INVOLVED.

The applicable statutes are:

1. 10 U.S.C. 846 (Appendix A);
2. 50 U.S.C. Appendix 1002-1009, the so-called Missing Persons Act (Appendix B).

SPECIFICATION OF ERROR.

1. The lower court erred in that it considered irrelevant and immaterial facts in arriving at its decision.

2. The lower court erred in that it indulged in judicial legislation by interpolating into 10 U.S.C. 846 conditions which do not exist in said statute and which were never intended to exist in said statute.

3. The lower court erred in that it gave an unconstitutional interpretation to 10 U.S.C. 846 and 50 U.S.C. Appendix 1002.

4. The lower court erred in that it interpreted 10 U.S.C. 846 in such a way as to permit the Department of the Army unilaterally and administratively (viz. other than by court-martial) to forfeit retroactively the earned pay of a member of the Armed Services.

5. The lower court erred in that it failed to set any standard by which the Department of the Army could work a unilateral administrative retroactive forfeiture of a serviceman's pay.

QUESTIONS PRESENTED.

1. Can the Department of the Army administratively determine that, due to misconduct, a person who has enlisted in the Army and who has not been discharged from the Army, has forfeited his right to pay and allowances?

2. Can the Department of the Army, by its unilateral administrative act (viz., other than by court-martial), legally make a retroactive ruling that a former member of the Army is not entitled to his pay and allowances for a period of active duty, because of his misconduct during a portion of such period?

STATEMENT OF CASE.

The following facts have been established by the judgment below, the Commissioner's report or by admissions in the pleadings:

1. *Enlistment.* That each of the petitioners enlisted in the United States Army on the following dates:

OTHO G. BELL, January 29, 1949;
WILLIAM A. COWART, January 7, 1949;
LEWIE W. GRIGGS, August 4, 1949.

2. *Capture.* That each of the petitioners was captured by either the North Korean forces or the Chinese Communist forces in Korea on the following dates:

OTHO G. BELL, November 30, 1950;
WILLIAM A. COWART, July 12, 1950;
LEWIE W. GRIGGS, August 25, 1951.

3. *Rank.* That at the time of capture each of the petitioners was a Private 1st Class.

4. *Promotion.* The records of the Department of the Army show that each of the petitioners was made a Corporal as of May 1, 1953.

5. *Confinement.* Each of the petitioners was confined as a Prisoner of War from the date of his capture until August 5, 1953, when each refused repatriation.

(Note: This fact is taken from Paragraph XV of respondent's answer. Petitioners contend they were Prisoners of War until the date of their discharge.)

6. *Misconduct.* Each of the petitioners at some unknown time after the date of his capture commenced to do various alleged acts of misconduct.

7. *Refusal of Repatriation.* The Korean Armistice was signed on July 27, 1953. Prisoner repatriation began on August 5, 1953. Each of the petitioners refused repatriation and went to Communist China sometime after August 5, 1953.

8. *Discharge.* Each of the petitioners was dishonorably discharged from the United States Army on January 23, 1954.

9. *Pay.* Except for allotments for dependents and insurance, none of the petitioners have received any pay for the period starting some months before their capture to the date of their dishonorable discharges. This includes both regular pay and combat pay.

10. *Voluntary Repatriation.* Each of the petitioners voluntarily returned to the United States in July, 1955, and was confined by the United States Army in San Francisco, California, awaiting trial by General Court-Martial for violation of Article 104 of the Uniform Code of Military Justice.

11. *Release from Confinement.* On November 10, 1955, the petitioners were released from confinement on writs of habeas corpus issued by the United States District Court for the Northern District of California (Otho G. Bell, et al., vs. Robert N. Young, et al., Nos. 34865, 34880 and 34881, United States District Court for the Northern District of California, Southern Division). These writs were issued on the basis of *Toth v. Quarles,* 350 U.S. 11 and *Reid v. Covert,* 354 U.S. 1, in that since the petitioners had been discharged from the Army they were no longer amenable to Court-Martial jurisdiction. Like the *Toth* and *Reid* decisions, the Federal Court did not rule that the petitioners could not be tried, but rather ruled that if they were to be tried, they should be tried in a civilian court where they would enjoy their basic Constitutional guaranties.

12. *Claim for Pay.* On November 8, 1955, the petitioners made claim upon the Department of the

Army for their back pay. On October 2, 1956, the Department of the Army denied the petitioners' claim.

13. *Action Below.* On December 31, 1956, the petitioners filed a petition in the United States Court of Claims for their back pay. On March 2, 1960, the United States Court of Claims entered an opinion in which the majority of the Court denied the right of petitioners to any of their pay.

ARGUMENT.

It is the contention of your petitioners that the facts enumerated in the Statement of Facts are the only relevant and material facts which should be considered by the Court in determining the right of a serviceman to his pay under the military pay statutes here involved.

Your petitioners and the respondent entered into a Stipulation of Facts from which the Commissioner's report was drawn (R.P. 8). This Stipulation of Facts and the Commissioner's Report contain a long list of facts of misconduct attributed to your petitioners. The court below states that "the plaintiffs *admit* that they gave aid and comfort to the enemy" (R.P. 42, emphasis added). This is not accurate. The first paragraph of the Stipulation of Facts reads as follows (R.P. 8):

> "It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the facts hereinafter set forth shall, for the purpose of this case, be deemed to have been elicited by competent testimony of witnesses

called by the defendant, and unrebutted by the plaintiffs or their witnesses, and shall constitute a part of the record in this case; provided that either party may offer additional evidence, either by way of testimony or exhibits. Plaintiffs, however, reserve the right to object to the materiality and relevancy of any of the agreed facts hereafter set forth."

Paragraph 7 of the Findings of Fact (R.P. 47) states in part as follows:

"The parties, by their attorneys, entered into a stipulation of record by the terms of which, for the purposes of this proceeding, certain facts were to be deemed to have been elicited from the defendant's witnesses, testifying under oath, without the necessity of calling such witnesses to trial. The plaintiffs did not rebut the facts so elicited and waive the right to testify or to call witnesses to testify in rebuttal of the said facts, although the plaintiffs did reserve the right to object to the materiality and the relevancy of any of the facts."

The petitioners do not admit to the alleged acts of dishonor contained in the Stipulation and the Findings of Fact, but rather demur to them on the grounds that such facts are irrelevant and immaterial in a civil action for military pay provided by statute.

Since the respondent has raised the alleged acts of dishonor as a defense and since the petitioners have contended that they are irrelevant and immaterial, the Court has no alternative but to consider the alleged acts for the limited purpose of determining their

materiality. However, in considering the alleged acts of dishonor for this limited purpose, it would seem that the Court should consider them not as specific criminal acts of dishonor in the light of present-day passions, but should consider such alleged acts in the light of the continuing principles of law[1] governing servicemen and their pay.

Considering such acts in the light of the principle being considered and for the purpose of determining their materiality, such alleged acts cease to be acts of giving aid and comfort to the enemy and become nothing more and nothing less than acts of misconduct, the same as murder, desertion, or insubordination, and if considered for this limited purpose, would lose their identity as specific acts of dishonor in the criminal sense and become simply misconduct in the civil sense.[2] The rule propounded by the court below does

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[1]In its Brief in Opposition to the Petition for Certiorari, the respondent states that "This case presents a relatively narrow and presumably nonrecurrent question of statutory construction" (Brief, page 8). However, in the Court below the respondent used such phrases as ". . . a problem of far reaching importance to the Armed Services and of legal issues that involve statutory construction . . .", (Defendant's Brief to the Court of Claims, page 23). And, "This case is a matter of great importance to all the Armed Services because of the possible effect recovery by plaintiffs would have on personnel now in the service while we are at peace, and more especially on future personnel who may become prisoners of war in a possible future conflict". (Defendant's Brief to the Court of Claims at page 64). And, "It would be a dangerous *precedent* if this court were to hold that plaintiffs are entitled to their pay and allowances in the face of this fundamental breach of their enlistment contracts . . . 11", (emphasis added). (Defendant's Brief to the Court of Claims, page 51).

[2]The respondent has argued both to the Court below (Defendant's Brief to the Court of Claims, page 49) and to this Court (Brief in Opposition, page 8) that the petitioners, by their alleged acts of misconduct, have breached their enlistment contracts. If

not purport to limit its application to any specific type of misconduct, but rather grants to the dispersing officer the authority to forfeit pay for any misconduct. Today the Army claims the right to administratively and unilaterally forfeit pay for one type of misconduct; tomorrow the Army may choose to administratively and unilaterally forfeit the pay for another type of misconduct.

The key question, therefore, is not whether the specific acts of misconduct involved in this case are material and relevant, but whether any acts of misconduct are material and relevant when determining a serviceman's entitlement to pay under a military pay statute. If this is not accepted as the premise, then we get into the "anomalous proceedings" mentioned in *White v. The United States* (infra).

This brief is in nowise intended to attempt to justify or condone the alleged misconduct of the petitioners, if any. This brief is written in the interest of, and on behalf of, all future servicemen who stand in danger of having their pay retroactively checked by the unilateral administrative act of the Commanding Officer or Disbursing Officer who feels that they are guilty of some act of misconduct.

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these acts of misconduct can constitute a breach of an enlistment contract, so could any one of the various other military offenses enumerated in the Uniform Code of Military Justice, 1951 (64 Stat., 126; 50 U.S.C. 698). *In re Grimley*, 137 U.S. 147; *In re Morrissey*, 137 U.S. 157; *U. S. v. Blanton*, 7 U.S.C.M.A. 664, 23 C.M.R. 128, are but a few of the long line of decisions that have conclusively established the principle that it is impossible for a soldier to abandon his status as a soldier or to breach his enlistment contract.

IS A SERVICEMAN'S CONDUCT RELATIVE AND MATERIAL TO HIS ENTITLEMENT TO PAY UNDER A SPECIFIC PAY STATUTE?

10 U.S.C. 846 provides in whole as follows:

> "Every noncommissioned officer and private of the regular Army and every noncommissioned officer and private of any militia or volunteer corps of the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence and allowance to which he may be entitled while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law (R.S. Section 1288)".

Applying the relevant parts of 10 U.S.C. 846 to this case, we have:

10 U.S.C. 846.	**Facts in the Instant Case.**
"Every . . . private in the regular Army. . . ."	Each of your petitioners in the instant case was a private first class in the United States Army at the time of his capture.
	Authority:
	1. "Defendant's Answer. Paragraph 5 (R.P. 4) ". . . and alleges that at such time each of the plaintiffs was a private first class."
	2. "Findings of Fact." Paragraph 4 (R.P. 47) "At the time of their capture, as aforesaid, the plaintiffs were privates first class in the United States Army."

10 U.S.C. 846.	Facts in the Instant Case.
". . . who is captured by the enemy . . ."	Petitioner, Bell, was captured by enemy forces on November 30, 1950; Petitioner, Cowart, was captured by enemy forces on July 12, 1950; Petitioner, Griggs, was captured by enemy forces on April 25, 1951.
	Authority:
	1. Defendant's Answer, Paragraph 3 (R.P. 4), admits Paragraph III of plaintiffs' petition (R.P. 1) which states, "plaintiff, Otho G. Bell, was captured in combat by enemy forces in Korea on November 30, 1950; that plaintiff, William A. Cowart, was captured in combat by enemy forces in Korea on July 12, 1950; that plaintiff, Lewie W. Griggs, was captured by enemy forces in Korea on April 25, 1951."
	2. Findings of Fact, Paragraph 3 (R.P. 46, "The plaintiffs, Bell, Cowart and Griggs, were captured by the North Korean and/or Chinese Communist Forces in Korea, along with other United States soldiers, on the respective dates of November 30, 1950; July 12, 1950; and April 25, 1951."
". . . shall be entitled to receive during his *captivity* . . ." (Emphasis added.)	Petitioner, Bell, was in captivity from November 30, 1950, until January 23, 1954; Petitioner, Cowart, was in captivity from July 12, 1950, until January 23, 1954; Petitioner,

10 U.S.C. 845.

Facts in the Instant Case.

Griggs, was in captivity from April 25, 1951, until January 23, 1954.

Authority:

1. Defendant's Answer, Paragraph 15 (R.P. 5), "Plaintiffs were among 21 *Prisoners' of War* who had served in the Army in Korea, were *captured*, and in August, 1953, refused to be repatriated and returned to the United States' control when they were *released from prison*. Because plaintiffs refused repatriation when they were *released from prison as Prisoners of War* . . ." (Emphasis added.)

2. Defendant's Answer, Paragraph 5 (R.P. 4), "Denies the balance of the allegations of said paragraph concerning the status of plaintiffs as Corporals *during their captivity*, but admits that during said period, . . ." (Emphasis added.)

3. Findings of Fact, Paragraph 5 (R.P. 47), "Upon their *capture*, as aforesaid, the plaintiffs, Bell and Griggs, were *detained*, respectively, in Prisoner of War Camp No. 5, located at Pyoktong, North Korea, in the Prisoner of War Camp No. 1. The record does not otherwise disclose the place of detention of plaintiff, Cowart." (Emphasis added.)

10 U.S.C. 846.

Authority:

4. Findings of Fact, Paragraph 6 (R.P. 47), "The facts so set forth in the stipulation related to the activities of the plaintiffs *while they were detained as Prisoners of War* . . ." (Emphasis added.)

5. Findings of Fact, Paragraph 7 (R.P. 47), "During his *confinement* by enemy forces, as aforesaid, plaintiff, Bell . . ." (Emphasis added.)

6. Findings of Fact, Paragraph 17 (R.P. 52), "During his *confinement* by enemy forces, as aforesaid, plaintiff, Cowart . . ." (Emphasis added.)

7. Findings of Fact, Paragraph 25 (R.P. 55), "During his *confinement* by enemy forces, as aforesaid, plaintiff, Griggs . . ." (Emphasis added.)

8. Findings of Fact, Paragraph 31 (R.P. 57), "With reference to the plaintiffs' assertion *while confined* as POW's . . ." (Emphasis added.)

9. Findings of Fact, Paragraph 33 (R.P. 58), "With reference to the plaintiffs' assertion *while confined as POW's* . . ." (Emphasis added.)

10 U.S.C. 846.

". . . the same pay, subsistence and allowance to which he may be entitled while in the actual service of the United States;"

Facts in the Instant Case.

On the day of his capture, the petitioner, Bell, had accrued, but unpaid, combat pay due him in the sum of $315.00, and accrued, but unpaid, regular pay due him in the sum of $3.32.

1. Defendant's Exhibit No. 8 to Commissioner's Report[3] (R.P. 62).

"OTHO G. BELL, RA-18-276-618"

"30 Nov. '50—23 Jan. '54"

"Credits"

"Balance Due 30 Nov. '50 $3.32"

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[3]Paragraph 2, page 14, of the Stipulation of Facts, entered into between the parties hereto, provides in part as follows: "If any plaintiff is, or if all plaintiffs are, entitled to recovery in this action, the amount or amounts subject to offsets, will be determined by the General Accounting Office, in conjunction with the Army, or by further proceedings, if the Court so orders."

On May 25, 1959, counsel for defendant sent to counsel for plaintiff a certified photostatic copy of an accounting made by the General Accounting Office, which accounting listed the various "credits" and "debits" of the pay accounts of each of the plaintiffs. On June 1, 1959, counsel for plaintiffs returned the certified photostatic copies of the accounting to the counsel for defendant. On July 1, 1959, counsel for the defendant sent to counsel for the plaintiffs a Stipulation of Damages, based on the aforesaid accounting, and stated in the covering letter: "When the stipulation is submitted to Commissioner Bernhardt, we shall also submit to him to be marked as Defendant's Exhibit No. 9 the certified photostatic copy of the document from the General Accounting Office which you returned to us with your letter of June 1, 1959." On July 7, 1959, counsel for plaintiffs executed and returned to counsel for defendant the Stipulation of Damages. On July 15, 1959, counsel for defendant forwarded the executed Stipulation of Damages to the Commissioner. In the covering letter to the Commissioner, counsel for defendant stated: "We also enclose a certified photostatic copy of the document from the General Accounting Office which is to be marked 'Defendant's Exhibit No. 9.'"

10 U.S.C. 846.

Facts in the Instant Case.

Combat Pay 1 Aug. '50—28 Feb. '51 @ $45.00 315.00"

From the date of his capture until the date of his discharge, Petitioner, Bell, had accrued to him, but unpaid, pay, subsistence and allowance in the sum of $7,326.27, less debits in the sum of $6,186.30.

Authority:

1. Defendant's Exhibit No. 8 to Commissioner's Report (R. P. 62).

On the day of his capture, the Petitioner, Cowart, had accrued, but unpaid, combat pay due him in the sum of $180.00 and accrued, but unpaid, regular pay due him in the sum of $39.34.

Authority:

1. Defendant's Exhibit No. 6 to Commissioner's Report (R.P. 60).

"WILLIAM A. COWART, RA-14-313-067"

"12 July '50—23 Jan. '54"

"Credits"

"Balance Due 12 Jan. '50 $39.34"

"Combat Pay 1 July '50—31 Oct. '50 @ $45.00 180.00"

From the date of his capture until the date of his discharge, Petitioner, Cowart, had accrued to him, but unpaid, pay, subsistence and allowance in the

10 U.S.C. 846.

Facts in the Instant Case.

sum of $5,131.04, less debits in the sum of $4.25.

Authority:

1. Defendant's Exhibit No. 6 to Commissioner's Report (R.P. 60).

On the day of his capture, Petitioner, Griggs, had accrued, but unpaid, combat pay due him in the sum of $585.00 and accrued, but unpaid, regular pay due him in the sum of $63.33.

Authority:

1. Defendant's Exhibit No. 7 to Commissioner's Report (R.P. 61).

"LOUIS W. GRIGGS, RA-18-322-825"

"25 April '51—23 Jan. '54"

"Credits"

"Balance Due 25 April '51 $63.33"

"Combat Pay 1 July '50—31 July '51 @ $45.00 585.00"

From the date of his capture until the date of his discharge the Petitioner, Griggs, had accrued to him but unpaid, pay, subsistence and allowance in the sum of $4,060.35, less debits in the sum of $1,901.54.

Authority:

1. Defendant's Exhibit No. 7 to Commissioner's Report (R.P. 61).

From the above, it would appear that each of the petitioners has complied with all the conditions of 10 U.S.C. 846 and that each is thus entitled to the pay which the statute allows him.

THE STATUTE AND ITS PREDECESSORS.

The following important factors should be noted about 10 U.S.C. 846:

1. The first predecessor of 10 U.S.C. 846 was enacted in 1814 as 3 Stat. L. 114, Sec. 14.

2. In the 146 years since this first enactment, the section has been amended and re-enacted a number of times.

3. In the 146 years since this first enactment, the United States has been involved in a number of wars and in each of these wars there have been American Prisoners of War who have misconducted themselves in a manner similar to, or worse than, the alleged misconduct of the plaintiffs.[4]

4. 10 U.S.C. 846 (1952) as quoted above, is valid and subsisting Federal Legislation in and of itself. 50 U.S.C. App. 1002-1009 does not directly or indirectly or by innuendo purport to modify, change or repeal any part of 10 U.S.C. 846.

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[4]Judge Madden, in his dissent, states: "There has never been a war in which some prisoners have not acted contemptibly, in comparison with the conduct of their better-balanced comrades". (R.P. 45). For examples of prisoner misconduct, see *Ex Rel. Hirshberg v. Cooke*, 336 U.S. 210; *Petition of Provo*, 17 F.R.D. 183 and 350 U.S. 857; see also the many cases dealing with Union Prisoners of War who joined the Confederacy during the Civil War.

5. Neither 10 U.S.C. 486 nor any of its predecessors have ever had any type of condition as to conduct, nor made any conduct a condition to entitlement under the act.

6. 10 U.S.C. 846 does not mention the word "status", either as "status as a soldier", "status as a prisoner", "status of captivity", or at all.

7. 10 U.S.C. 846 does not now, and never has, given to the "head of the department concerned" or to anyone else the "authority to make determinations necessary to the administration of the act".

8. 10 U.S.C. 846 does not now, and never has, given to the department or anyone else, authority to determine "status" or "entitlement to pay", or to make any such determination "conclusive".

STATUTORY CONSTRUCTION.

The lower court, by the purported office of statutory construction, has made several changes in 10 U.S.C. 846. First, it has made good conduct a condition to entitlement under the act. Second, it has given to the department head or his agent the authority to determine whether or not a person is in the "status of a prisoner". Third, it has given to the department head or his agent the authority to change or modify his previous determination. Fourth, it has made such a determination by the department head or his agent conclusive. Neither 10 U.S.C. 846 nor any of its predecessors have ever expressly or impliedly contained any of these conditions or restrictions.

It is respectfully submitted that the lower court is not engaging in the art of statutory construction, but rather is experimenting in the field of judicial legislation. In *U. S. v. Reese,* 92 U.S. 214, the Supreme Court held, at page 221:

> "To limit the statute in the manner now asked for would be to make a new law, not to enforce an old one. This is not part of our duty."

It is respectfully submitted that the lower court is not interpreting an existing statute (viz. 10 U.S.C. 846) but, by the office of interpolation, is enacting a new statute. In *Lewis v. The United States,* 92 U.S. 618 at page 623, this Court held:

> "Neither statute contains any qualification, and we can interpolate none. Our duty is to execute the law as we find it; not to make it."

Even if we were to disregard the rule of statutory construction which precludes judicial legislation and were to indulge in the evil that it was intended to guard against, we would still arrive at the same inescapable conclusion because of another well known rule of construction. One of the most ancient rules of statutory construction is that the inclusion of express conditions in a statute raises a presumption that Congress intended to exclude all other conditions. This rule is well stated in *Statutory Construction,* Crawford Law Book Co., 1940, page 195:

> "As a general rule, in the interpretation of statutes, the mention of one thing implies the exclusion of another thing. It, therefore, logically follows that if a statute enumerates the things upon

> which it is to operate, everything else must necessarily and by implication be excluded from its operation and effect."

The Supreme Court in the case of *Fullinwider v. Southern Pacific Railroad Company,* 248 U.S. 409, stated the rule as follows at page 412:

> "We grant, if a policy exists, that it may be used to resolve the uncertainty of a law, but it cannot be a substitute for a law. However, we do not find the uncertainty in Sections 9 or 23 that complainant does, whether jointly or separately considered. Section 23 is complete in itself. The restrictions upon the grant it made that were deemed appropriate were expressed, and their expression excludes any other by a well known rule of construction."

In the instant case, Congress, in enacting 10 U.S.C. 846, included certain express conditions which had to be met before a person was entitled to the benefits of the section. This statute has been amended or re-enacted many times over a period of many years. The conditions for entitlement under the statute have remained substantially unchanged during each of the occasions that the statute was enacted, re-enacted, or amended. It is presumed that Congress was aware of the fact that there have been American Prisoners of War in each war in which the United States has been involved who have committed acts which were disloyal to the United States. Yet, being aware of this fact, Congress, on each occasion that it re-enacted this section, did not see fit to condition the entitlement on the

conduct of the Prisoner of War. Therefore, it must be presumed that no such condition was intended to exist.

This Court, in the case of *Carter's Heirs v. Cutting*, 12 U.S. 250, at page 251, stated:

> "We cannot admit that construction to be a sound one, which seeks, by remote inference, to withdraw a case from the general provisions of a statute, which is clearly within its words and perfectly consistent with its intent."

It is submitted that insofar as the rules of statutory construction are applicable to the instant case, the Court should follow the reasoning of *U. S. v. Chase*, 135 U.S. 255; at page 261, this Court held:

> "We recognize the value of the rule of construing statutes as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this Court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they involve the same mischief which the statute was designed to suppress."

And at page 262, the Court held:

> "Ashurst, J., said in Jones v. Smart, 1 TR 51: 'It is safer to adopt what the legislature have actually said than to suppose what they meant to say.' In the Queensborough cases, 1 Blight 497, Lord Redesdale said: 'The proper mode of disposing of difficulties arising from a literal construction is by an act of Parliament, and not by the decision of court'."

If, as the lower court feels, the statute in its present form permits of evil and abuse, it should be amended or repealed, but such amending or repealing should be done by the legislature and not by the court.

If, in the instant case, the Army is permitted under the guise of statutory interpretation to legislate a condition of good conduct into 10 U.S.C. 846, then what is to preclude the Army from legislating a similar condition into any or all of the various other statutes which relate to military pay? This leads us into the second and more important aspect of the lower court's decision—the aspect of the effect the lower court's decision will have upon future servicemen.

AN ANALYSIS OF THE LOWER COURT'S OPINION.

To determine the future effect of the lower court's decision, we must first analyze that decision.

1. Administrative Forfeiture.

The decision of the lower court authorizes the forfeiture of a soldier's pay by the unilateral administrative act of the Army.

The lower court held (R.P. 40):

> "The department, in denying plaintiff's claims which were filed with the department for pay,[5] necessarily determined under the provisions and

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[5]The procedural manner in which the Department of the Army unilaterally and administratively forfeited the plaintiffs' pay is spelled out and apparently approved by the lower court in Footnote No. 3 of its decision (R.P. 40).

> authority of the statute just quoted[6] that during the periods involved these plaintiffs did not have a status as prisoners, and were not entitled to pay under the quoted statutes."[7]

This holding by the lower court is contrary to all prior decisions relating to forfeiture of military pay.

In *Walsh v. The United States*, 43 Ct. Cl. 25, page 231, the Court of Claims held:

> "Aside from this, it has been held by this court in a number of cases that the mere fact that an officer or soldier is under charges, it does not deprive him of his pay and allowances, and such forfeiture can only be imposed by way of a lawful court-martial." (Citations omitted.)

The Court went on to say in the *Walsh* case:

> "As above stated, the uniform decisions of this court have been that it required the decision of a court-martial to deprive an officer of his pay and allowances."

See also *F. de Carrington v. The United States*, 46 Ct. Cl. 279.

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[6]The statute "just quoted" is 50 U.S.C. App. 1002 and 1009. It is interesting to note that the lower court completely ignores 10 U.S.C. 846 which does not give to the department any authority to determine anything.

[7]It should be borne in mind that Petitioners are seeking combat and regular pay which had accrued to them prior to capture, as well as pay after capture. (Supra, page 5). The respondent in its Brief in Opposition to the Petition for Certiorari, states at page 8: "Absent a statute which entitles them to pay, petitioners clearly have no right to pay for the period for which they sue." This is not accurate. Petitioners each had accrued pay "on the books" before their capture. This pay, though it could be paid under 10 U.S.C. 846 as pay due *on the day of capture*, is not dependent upon 10 U.S.C. 846 or upon 50 U.S.C. app. 1002.

Moreover, the more recent enactments of Congress have been to the effect that even a court-martial cannot forfeit accrued pay such as the plaintiffs are seeking in the instant case. (See Uniform Code of Military Justice, effective June 5, 1950, 64 Stat. 126, 50 U.S.C. 638.)

2. Unconstitutional Forfeiture.

The lower court's decision authorizes the Army to deprive a serviceman of his property without due process of law.

It is submitted that earned pay is a property right protected by the Fifth Amendment to the Constitution of the United States. In *U. S. Ex Rel. Innes v. Hiatt*, 141 F. 2d 664, the Third Circuit held:

> "An individual does not cease to be a person within the protection of the Fifth Amendment of the Constitution because he joined the Nation's Armed Forces and has taken the oath to support the Constitution with his life, if need be. The guarantee of the Fifth Amendment that: 'No person shall . . . be deprived of his life, liberty or property, without due process of law' makes no exception in the case of persons who are in the Armed Forces. The fact that the framers of the Amendment did not specifically except such persons from the guaranty of the right to a presentment or indictment by a grand jury, which is contained in the earlier part of the Amendment, makes it even clearer that persons in the Armed Forces were intended to have the benefit of the due process clause."

In the instant case, the pay which the petitioners have accrued or earned prior to their capture, and the pay which accrued to them after their capture, was taken from them by an administrative act of the Army, without hearing, without opportunity to be heard, without opportunity to call witnesses, and without any right to appear.

3. Retroactive Forfeiture.

The decision of the lower court makes the unilateral administrative forfeiture by the Army retroactive.

The Stipulation of Facts and the Findings of Fact give no dates as to when the alleged acts of misconduct commenced, save the one notation that the petitioner, Bell, became a monitor on January 1, 1951 (Findings of Fact, Paragraph 7 (R.P. 47)).

The lower court's ruling is that the alleged misconduct of petitioners in the latter stages of their confinement has the effect of causing a forfeiture of pay which accrued to them during the early period of captivity, in which it is not alleged that they misconducted themselves. It also has the effect of working a forfeiture of pay which they had earned prior to their capture.[8]

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[8]The respondent in its Brief in Opposition to the Petition for Certiorari states that this issue was not before the Court. This statement by the respondent is absurd. First, by their petition the petitioners asked for all pay due them on the day of their capture and on each day thereafter until the day of their discharge. As seen by the Defendant's Exhibits Nos. 6, 7 and 8 (R.P. 60, 61 and 62) to the Commissioner's Report, each of the Petitioners had pay due him on the day of his capture. Second, as seen in Footnote No. 3, page 14 of this brief, the amount of damages was fixed by an accounting made by the General Ac-

4. Burden of Proof.

The decision of the lower court imposes the burden of establishing lack of misconduct on the serviceman. The lower court's decision at page 43 of the record states:

> ". . . but this is a civil court in which plaintiffs must establish their right to affirmatively recover."

If the respondent were to try the petitioners in the Federal District Court for their alleged traitors' activities, as it is at liberty to do[9] and if it could get a

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counting Office and the defendant, and was supplied by the defendant to the plaintiffs. This accounting, which clearly showed on its face that the damages sought included combat and regular pay earned prior to capture, was made an exhibit to the Commissioner's Report by the defendant. As an exhibit admitted into evidence, this accounting was before the lower court. Third, the plaintiffs raised the issue of combat and regular pay accruing before capture in their opening brief (see Plaintiffs' Exceptions to Commissioner's Report and Plaintiffs' Brief, page 15) and in their oral argument to the Court.

[9]It should be noted that immediately after the Petitioners' return to the United States in July, 1955, the respondent sought to bring them to trial on the charge of Treason (Article 104, Uniform Code of Military Justice) before a court-martial. If the respondent had been successful in its attempt to try the Petitioners by court-martial, the Petitioners would have been denied many of their basic constitutional guaranties. (*Toth v. Quarles*, 350 U.S. 11; *Reid v. Covert*, and *Kansella v. Drueger*, 354 U.S. 1.) However, the United States District Court for the Northern District of California ruled that the respondent, by its own act of giving the Petitioners Dishonorable Discharges, had lost its jurisdiction to try the Petitioners by court-martial (*Otho G. Bell, et al. v. Robert N. Young, et al.*, Nos. 34865, 34880 and 34881, United States District Court for the Northern District of California, Southern Division.) However, the effect of this ruling by the District Court was *not* that the Petitioners could not be tried for their alleged traitors' conduct, but was that if they were tried they had to be tried in a civilian court where they would enjoy their basic constitutional guaranties. The United States District Court in California had, and still has, jurisdiction to try the Petitioners on the charge of treason, or on other charges, for

jury to convict the petitioners, the District Court, in addition to other punishment, could fine the petitioners an amount in excess of the back-pay which they seek.[10] It is submitted that the respondent did not elect to try the petitioners in a civilian criminal court for the reason that in such a proceeding the burden would be on the respondent to prove the acts of misconduct. It is submitted that the respondent felt that it could not risk the opinions of civilian jurors on the question of "subtle brainwashing techniques". (Madden's Dissent, R.P. 45.) It is submitted that for this reason respondent adopted the "crude and primitive method of refusing to pay them their money" (Madden's Dissent, Record, page 46), thereby placing the burden on the petitioners of proving that they did not misconduct themselves. This burden of proof is not only significant, it is determinative of the petitioners' rights. As might be expected of persons of their rank, petitioners' personal assets are extremely meager. With the burden of proof on them, they are in the financially untenable position of having to call vast numbers of witnesses to establish that they are *not* guilty of misconduct. The cost of locating and producing such witnesses is impossible. The respondent, however, suffers from no such handicap. With its

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their conduct while prisoners of war in Korea. (See 18 U.S.C. 2381; 18 U.S.C. 3238; 18 U.S.C. 2387; 18 U.S.C. 2388.) However, the respondent did not see fit to indict the Petitioners in a civilian court. The only conclusion which can be reached from this inaction on the part of the respondent is that the respondent did not, and does not, have sufficient proof to convict the Petitioners, or even to bring them to trial before a civilian court with a civilian jury.

[10] 18 U.S.C.A. 2381, 2387 and 2388.

unlimited resources of finance and manpower,[11] respondent could easily produce any and all witnesses who might contribute even the slightest amount of relevant testimony. Such a situation is hardly conducive to equitable litigation.

5. Standard of Care.

The decision of the lower court fails to establish any standard of conduct or care.[12]

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[11]At the Commissioner's hearing, held at Monterey, California, on May 4, 1959, respondent produced witnesses from such divergent places as Washington, D.C., Atherton, California, and Denver, Colorado. One witness was called from Albuquerque, New Mexico, for the sole purpose of establishing the fact that conditions and treatment in Prisoners of War Camps were extremely harsh. The Petitioners stipulated to this fact. Another witness was called from Washington, D.C., for the sole purpose of establishing that the United States did not use germ warfare in Korea. The Petitioners stipulated to this fact.

In a letter dated March 14, 1957, addressed to the Honorable C. Murray Bernhardt, Commissioner, United States Court of Claims, respondent stated in part: "It is expected that the government will have a large number of witnesses who were in the service with plaintiffs during the Korean Conflict and during their incarceration as Prisoners of War. For the most part, these persons are no longer in the Army and it will take some time to ascertain their present locations and arrange to confer with them relative to their testifying in this case."

[12]The respondent, in its Brief in Opposition to the Petition for Certiorari, states at page 8: "To the best of our knowledge, this case is the first in the history of this country in which captured American soldiers have served an enemy of the United States and then sued for pay from the United States for the period in which they were doing so. Moreover, there are no other claims of this kind arising out of the Korean Conflict; and there is no prospect of similar claims in the foreseeable future."

This statement is true only because this is the first case since 1931 (*White v. United States*, infra) in which the respondent has refused to pay a serviceman what the statute allowed him. During each war in which the United States has become involved, there have been American prisoners of war who have misconducted themselves in a manner similar to that charged to your plaintiffs.

The lower court's decision is a civil ruling that makes good conduct a condition of entitlement of a serviceman to his pay. However, the lower court's decision wholly fails to establish any standard of conduct or standard of care. Is the standard to be a "reasonable man under the circumstances" type of standard? Is a standard to be based upon the conduct of the best soldier, the average soldier, or the least soldier? Is a standard to vary with rank? Is the colonel to be held to a higher standard than the private? Is a standard to be different dependent upon the type pay sought, the statute involved, or the "various provisions with respect to pay and allowances of officers and men of the Army, Navy and Marine Corps?" (*White v. United States*, infra.) Is the standard to be different in the different branches of the service, as was the

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During the Korean Conflict there was a high percentage of such misconduct, apparently because our enemies concentrated on this phase of warfare. Major William E. Mayer, an Army psychiatrist who spent 4 years studying "brainwashing" during the Korean conflict reports, in the February 24, 1956, issue of *U. S. News and World Report*, that:

> "About one-third of all the American Prisoners said they became something called 'progressives'. By the Communists' own definition, this meant that a man was either a Communist sympathizer or a collaborator, or both, during his stay in a Prison Camp."

There were many former Korean prisoners of war whom the Army tried by General Court Martial for violations of Article 104 and Article 105 of the Uniform Code of Military Justice. These men were convicted of conduct far more heinous than that which is charged to your plaintiffs. For example, see *U. S. v. Dickenson*, 17 C.M.R. 438; *U. S. v. Batchelor*, 19 C.M.R. 452; *U. S. v. Bayes*, 22 C.M.R. 487; *U. S. v. Gallagher*, 21 C.M.R. 435; *U. S. v. Olson*, 20 C.M.R. 461; *U. S. v. Major Ronald E. Alley*, 25 C.M.R. 63; and *U. S. v. Lt. Col. Harry Fleming*, 19 C.M.R. 438. Despite the fact that each of these accused was tried and convicted of the military equivalent of treason, each received all the pay and allowances which the statute allowed him.

case during the Korean Conflict?[13] In a case of continuing misconduct, what factor is to be used by the Court in determining when the conduct became sufficiently acute to work a forfeiture of pay?[14]

All of these, and many more, will be the questions asked by future generations of judges, lawyers, disbursing officers, and soldiers.

6. Conclusive Administrative Determination.

The decision of the lower court makes the unilateral administrative ruling by the Department of the Army conclusive. The lower court holds:

> "We held in the case of *Moreno v. United States*, 118 Ct. Cl. 30 (1950) that under the provisions of Section 1009, supra, of the Missing Persons Act, the department head was authorized to conclusively determine both the status and entitlement to pay under the act." (R.P. 42.)

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[13]The Army tried a number of its personnel under Articles 104 and 105 of the Uniform Code of Military Justice for their conduct while prisoners of war (see Footnote No. 12, supra). It is interesting to note that, though each of the other branches of the Armed Services had prisoners of war who misconducted themselves, no other branch of the service saw fit to bring any of its personnel to trial for such conduct. See for example the case of Col. Frank H. Schwable. The United States Marine Corps convened a Court of Inquiry on the Colonel and concluded that he was not responsible for his acts. See also the publication, *Facts on File, 1955*, page 191, where the conduct of various Air Force and Marine Corps officers is listed.

[14]As for example, in the instant case, the Petitioner, Bell, is alleged to have commenced his course of misconduct on January 1, 1951, one month after his capture. This misconduct consisted of leading a discussion group. The lower court does not specify whether it was this act or some subsequent act which fell below the hypothetical standard of conduct. The lower court simply lists various acts which occurred on unspecified days and forfeits the Petitioner's pay, whether or not it was earned or accrued prior to or after the commencement of the alleged acts of misconduct.

The lower court also states:

> "R. S. 1288, 10 U.S.C. Section 846, supra, was enacted in 1814. Numerous statutes have been enacted and committee reports made since that time. These latter statutes, including Sections 1002, 1006 and 1009, supra, of the legislation entitled the Missing Persons Act, as amended, cover the cases here presented. In fact, not only the language of the act itself, but committee reports at the time these sections were enacted clearly show that but for the Missing Persons Act there would be no basis of a claim for compensation." (R. P. 39.)

Therefore, presumably, the lower court is stating that the provisions of 50 U.S.C. App. 1009, relating to the conclusive nature of the administrative determination by the Department of the Army is also applicable to 10 U.S.C. 846. Thus, there is interpolated into 10 U.S.C. 846 three conditions, to-wit: Conduct, administrative determination, and conclusiveness. This interpolation of words into the act has the effect of completely denying the serviceman his day in court.

EFFECT ON FUTURE SERVICEMEN.

Having thus analyzed the lower court's decision, what will be the effect upon future soldiers?

It is submitted that the lower court's decision places the serviceman in a very insecure and inequitable position. If the disbursing officer, or the commanding officer, or anyone else in the chain of command, uni-

laterally decides that a particular soldier has misconducted himself, he can forfeit that soldier's pay, retroactively, so as to include pay accruing prior to such misconduct. The soldier would be given no notice of such forfeiture, would not be entitled to call witnesses in his own defense, would have no right to confront or question his accusers, and would not be entitled to any type of hearing. In short, he would have to take the Army's word for it, that he was guilty of unspecified, or at least generalized, misconduct,[15] which occurred or commenced on unstated dates, which was sufficiently acute that it failed to meet an unknown standard of care and thus worked a retroactive forfeiture of his pay. If the serviceman is unhappy with the unilateral retroactive administrative decision, he could possibly file a claim in the Court of Claims. However, this would be questionable as the Court might find by interpolation that the unilateral administrative ruling by the Army was conclusive,[16] thereby

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[15]In the instant case when the Petitioners demanded their pay, they received the following response from the Department of the Army:

> "I have been advised that the following determinations have been made regarding the status of all U. S. Army voluntary nonrepatriates who elected not to accept repatriation to the United States control under the terms of the Korean Armistice Agreement prior to 23 January 1954:
>
> a. That all voluntary nonrepatriates who refused to elect repatriation to the United States and *their records as Prisoners of War*, adopted, adhered to, or supported the aims of Communism, one of which is the overthrow of all nonCommunist countries, including the government of the United States by force or violence." (Emphasis added; R.P. 40.)

It is hard to imagine a more generalized statement of misconduct.

[16]There is nothing in 10 U.S.C. 846 which makes the department's ruling conclusive, yet the lower court holds that the ruling of the Department of the Army is conclusive under 10 U.S.C. 846.

completely denying the serviceman his day in court. Assuming, however, that the serviceman is allowed to file his claim before the Court of Claims, he finds himself faced with insurmountable obstacles. He must employ counsel and provide that counsel with adequate funds to pay filing fees and printing costs, to investigate the case and to depose and produce witnesses. He must then bear the burden of proving he was not guilty of misconduct, against an adversary who has unlimited assets and manpower. When you couple these things with a delay of perhaps four years,[17] it is hard to imagine a more inequitable situation.

CONCLUSION

It is respectfully submitted that on principles of both law and equity, the prior decision of the Court of Claims in *White v. United States* (1931), 72 Ct. Cl. 459, is a far better heritage to leave to our future servicemen.

> "The controller, I think, misconceived the true basis of the right to pay in the case mentioned. In the Navy, as in the Military Service, the right to compensation does not depend upon, nor is it controlled by, general principles of law; it does rest upon, and is governed by certain statutory provisions and regulations made in pursuance thereof which especially apply to such services. These fix the pay to which officers and men belonging to the

[17] In the instant case your Petitioners made their demand upon the Army for their pay on November 8, 1955. The Court of Claims ruled on the matter on March 2, 1960.

Navy are entitled; and the rule to be deduced therefrom is that both officers and men become entitled to the pay thus fixed so long as they remain in the Navy, whether they actually perform services or not, unless their right thereto is forfeited or lost in some one of the methods prescribed in regulations averted to."

"It would, we think, be an anomalous proceeding to permit resort to the courts to ascertain whether, under all of the various provisions with respect to pay and allowances of officers and men of the Army, Navy, and Marine Corps, investigation should obtain to determine as a matter of fact whether the soldier had, by conscientious service, earned what the statutory provisions allowed him."

Respectfully submitted,

ROBERT E. HANNON,

Attorney for Petitioners.

(Appendices A and B Follow.)

Appendix A

10 U.S.C. § 846 (1952) provides as follows:

"Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled, while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law. (R.S. § 1288.)"

Appendix B

50 U.S.C. App. § 1002 (1952) provides as follows:

"Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered or besieged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credit to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled thereafter, and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]: *Provided,* That such entitlement to pay and allowances shall not terminate upon expiration of term of service during absence and in case of death during absence shall not terminate earlier than the dates herein described: *Provided further,* That there shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period."

50 U.S.C. App. § 1006 (1952) provides as follows:

"When it is officially reported by the head of the department concerned that a person missing under the

conditions specified in section 2 of this Act [section 1002 of this Appendix] is alive and in the hands of a hostile force or is interned in a foreign country, the payments authorized by section 3 of this Act [section 1003 of this Appendix] are, subject to the provisions of section 2 of this Act [section 1002 of this Appendix], authorized to be made for a period not to extend beyond the date of the receipt by the head of the department concerned of evidence that the missing person is dead or has returned to the controllable jurisdiction of the department concerned. When a person missing or missing in action is continued in a missing status under section 5 of this Act [section 1005 of this Appendix], such person shall continue to be entitled to have pay and allowances credited as provided in section 2 of this Act [section 1002 of this Appendix] and payments of allotments, as provided in section 3 of this Act [section 1003 of this Appendix], are authorized to be continued, increased or initiated."

50 U.S.C. App. § 1009 (1952) provides as follows:

"The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001-1012 and 1013-1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential date including that upon which evidence or information is received in such department

or by the head thereof. The determination of the head of the department concerned, or of such subordinate as he may designate, shall be conclusive as to whether information received concerning any person is to be construed and acted upon as an official report of death. When any information deemed to establish conclusively the death of any person is received in the department concerned, action shall be taken thereon as an official report of death, notwithstanding any prior action relating to death or other status of such person. If the twelve months' absence prescribed in section 5 of this Act [section 1005 of this Appendix] has expired, a finding of death shall be made whenever information received, or a lapse of time without information, shall be deemed to establish a reasonable presumption that any person in a missing or other status is no longer alive. Payment or settlement of an account made pursuant to a report, determination, or finding of death shall not be recovered or reopened by reason of a subsequent report or determination which fixes a date of death except that an account shall be reopened and settled upon the basis of any date of death so fixed which is later than that used as a basis for prior settlement. Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act [sections 1001-1012 and 1013-1016 of this Appendix], to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: *Provided,* That no such account

shall be charged or debited with any amount that any person in the hands of a hostile force may receive or be entitled to receive from, or have placed to his credit by, such hostile force as pay, wages, allowances, or other compensation: *Provided further,* That where the account of any person has been charged or debited with allotments paid pursuant to this Act [said sections] any amount so charged or debited shall be re-credited to such person's account in any case in which it is determined by the head of the department concerned, or such subordinate as he may designate, that payment of such amount was induced by fraud or misrepresentation to which such person was not a party. When circumstances warrant reconsideration of any determination authorized to be made by this Act [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. Excepting allotments for unearned insurance premiums, any allotments paid from pay and allowances of any person for the period of the person's entitlement under the provisions of section 2 of this Act [section 1002 of this Appendix] to receive or have credited such pay and allowances shall not be subject to collection from the allottee as overpayments when payment thereof has been occasioned by delay in receipt of evidence of death, and any allotment payments for periods subsequent to the termination, under this Act [sections 1001-1012 and 1013-1016 of this Appendix] or otherwise, of entitlement to pay and allowances, the payment of which has been occasioned by delay in receipt of evi-

dence of death, shall not be subject to collection from the allottee or charged against the pay of the deceased person. The head of the department concerned, or such subordinate as he may designate, may waive the recovery of erroneous payments or overpayments of allotments to dependents when recovery is deemed to be against equity and good conscience. In the settlement of the accounts of any disbursing officer credit shall be allowed for any erroneous payment or overpayment made by him in carrying out the provisions of this Act [sections 1001-1012 and 1013-1016 of this Appendix], except sections 13, 16, 17, and 18 [sections 1013 and 1016, and former sections 1017, 1018 of this Appendix], in the absence of fraud or criminality on the part of the disbursing officer involved, and no recovery shall be made from any officer or employee authorizing any payment under such provisions in the absence of fraud or criminality on his part."

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No. 92

In the Supreme Court of the United States

OCTOBER TERM, 1960

OTHO G. BELL, WILLIAM A. COWART, and LEWIE W. GRIGGS, PETITIONERS

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	5
Summary of argument	9
Argument	12
I. Captured American soldiers who serve the enemy do not possess a statutory right to pay for that period	14
A. The Missing Persons Act does not grant the claimed pay to petitioners	14
B. Petitioners are not entitled to the pay under R.S. 1288	20
II. The decision of the court below neither alters the administration of military pay statutes nor threatens the security of future soldiers	23
Conclusion	29

CITATIONS

Cases:

Billings v. *Truesdell*, 321 U.S. 542	13
Boston Sand Co. v. *United States*, 278 U.S. 41	14
de L. Carrington v. *United States*, 46 C. Cls. 279	24
Grimley, In re, 137 U.S. 147	18
Harrison v. *Northern Trust Co.*, 317 U.S. 476	14
Moreno v. *United States*, 118 C. Cls. 30, certiorari denied, 342 U.S. 814	19, 24
Morrissey, In re, 137 U.S. 157	18
Posadas v. *National City Bank*, 296 U.S. 497	21
United States v. *American Trucking Associations*, 310 U.S. 534	13, 14
United States v. *Batchelor*, 7 USCMA 354, 22 CMR 144	13
United States v. *Dickenson*, 6 USCMA 438, 20 CMR 154	13
United States v. *Dickerson*, 310 U.S. 554	14

Cases—Continued Page

United States v. *Kingsley*, 138 U.S. 87 ..... 11, 25
United States v. *Landers*, 92 U.S. 77 ..... 11, 18, 23, 25, 27
Walsh v. *United States*, 43 C. Cls. 225 24
White v. *United States*, 72 C. Cls. 459 24

Statutes and Regulations:

Act of March 30, 1814, 3 Stat. 113, 115 21
Act of March 7, 1942, 56 Stat. 143 14
Act of July 1, 1944, 58 Stat. 679 14
Act of July 3, 1952, 66 Stat. 330 14
Act of April 4, 1953, 67 Stat. 20 14
Act of August 29, 1957, 71 Stat. 491 ..... 14, 20
Missing Persons Act, 56 Stat. 143, as amended, 50 U.S.C. App. 1001, *et seq.*:
50 U.S.C. App. 1001 ..... 2, 9, 14, 15
50 U.S.C. App.102 ..... 2, 9, 11, 14, 15, 16, 17, 20-21
50 U.S.C. App. 1009 ..... 3, 11, 19, 20, 23
R.S. 1288 (37 U.S.C. 242, formerly 10 U.S.C. (1952 ed.) 846) 4, 10, 20, 21, 22
Selective Service Act of 1948, Sec. 4(e), 62 Stat. 608 14
Uniform Code of Military Justice:
Art. 57, 10 U.S.C. 857 ..... 23, 25
Art. 104, 10 U.S.C. 904 13
Art. 105, 10 U.S.C. 905 13
10 U.S.C. 501 13
A.R. 35-1030 ..... 11, 23, 26
A.R. 35-1325 19

Miscellaneous:

5 Corbin, *Contracts* (1951 ed.) § 1127 19
H. Rep. No. 1680, 77th Cong., 2d Sess. 14
H. Rep. No. 204, 85th Cong., 1st Sess. 17
Restatement Contracts, § 357(1)(a) 19
S. Rep. No. 1060, 77th Cong., 2d Sess. 14
S. Rep. No. 970, 85th Cong., 1st Sess. 20
4 Williston, *Contracts* (1936 ed.) § 1022 19
5 Williston, *Contracts* (1936 ed.) § 1477 19
2 Winthrop, *Military Law and Precedents* (2d ed.) 829-30 18

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinions in the United States Court of Claims (R. 33-46) are reported at 181 F. Supp. 668.

JURISDICTION

The judgment of the Court of Claims was entered on March 2, 1960 (R. 59). The petition for a writ of certiorari was filed on May 17, 1960, and was granted on June 27, 1960 (R. 59; 363 U.S. 837). The jurisdiction of this Court rests upon 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether petitioners, captured American soldiers who voluntarily served the enemy during the Korean hostilities and subsequently refused repatriation to this country, are entitled to pay and allowances for the period between their capture by the enemy forces and their discharge from the Army.

STATUTES INVOLVED

1. The Missing Persons Act, 56 Stat. 143, as amended, 50 U.S.C. App. 1001 *et seq.*, provides in pertinent part (as it appears in the United States Code):

§ 1001. *Definitions*

For the purpose of this Act [sections 1001-1016 of this Appendix]—

* * * *

(b) the term "active service" means active service in the Army, Navy, Marine Corps, and Coast Guard of the United States, including active Federal service performed by personnel of the retired and reserve components of these forces, the Coast and Geodetic Survey, the Public Health Service, and active Federal service performed by the civilian officers and employees defined in paragraph (a) (3) above;

§ 1002. *Missing, interned, or captive persons.*

(a) *Continuance of pay and allowances.*

Any person who is in the active service * * * and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or beseiged

by a hostile force shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same * * * pay [and allowances] * * * to which he was entitled at the beginning of such period of absence or may become entitled thereafter * * * and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]. Such entitlement to pay and allowances shall not terminate upon the expiration of a term of service during absence and, in case of death during absence, shall not terminate earlier than the dates herein prescribed. There shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period. * * *

§ 1009. *Determinations by department heads or designees; conclusiveness relative to status of personnel, payments, or death*

(a) The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001-1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential

date including that upon which evidence or information is received in such department or by the head thereof. * * * Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act [sections 1001-1016 of this Appendix], to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: * * * When circumstances warrant reconsideration of any determination authorized to be made by this Act [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. * * *

2. R.S. 1288, 37 U.S.C. 242, formerly 10 U.S.C. (1952 ed.) 846, provides:

Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law.

STATEMENT

This suit was brought by three former members of the United States Army for pay and allowances for a period of time during the Korean hostilities in which they voluntarily served the enemy following their capture in combat.

1. *The stipulated facts* [1]—Petitioners enlisted in the Army in 1949. In the Korean conflict, they were captured and detained by North Korean and Chinese Communist forces (Findings 2 and 3; R. 46-47). During the period of their detention, petitioners voluntarily and actively served the enemy. In the prisoner of war camps to which they were assigned, they acted as squad monitors or leaders; in that capacity, they procured communist propaganda, and forced American prisoners to read it and comment favorably upon it. Petitioners reported the names of prisoners who refused to comply. Upon the recommendations of petitioners, prisoners who disobeyed, criticized, or talked back to petitioners were punished, *e.g.*, by hard labor, reduced rations, or by being forced to stand all day in the sun or in an icy river (Findings 7, 14, 15, 18, 21, 25, 26; R. 47-48, 50-52, 54, 55).

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[1] Petitioners did not agree in terms that the stipulated facts were true, but did agree that they "be deemed to have been elicited from defendant's witnesses testifying under oath", and that they "have not been rebutted by plaintiffs or by plaintiffs' witnesses"; petitioners also waived their right to introduce any testimony in rebuttal of these facts (R. 8). The findings of fact were based primarily upon the stipulation (R. 46-59).

Petitioners also acted as the enemy's informers within the prison camps. They gave the Chinese the names of prisoners who planned to escape or otherwise resisted the enemy. As a result, loyal American prisoners were placed in solitary confinement, bayonetted, and punished in other ways (Findings 15, 21, 26; R. 51-52, 54, 55). At least one prisoner died as a direct result of such a report by petitioner Bell (Finding 15; R. 51).

Petitioners also engaged in extensive propaganda activities for the enemy, both within and without the camps. They wrote articles for enemy newspapers and magazines, delivered lectures, drew cartoons and posters, took roles in plays and moving pictures, signed and circulated petitions and letters, and made recordings for radio broadcasts. This propaganda, designed to assist the enemy's prosecution of the hostilities, generally condemned the United States and its government, while extolling the virtues of communism and the communist countries. Petitioners depicted the United States as an aggressor, described atrocities which they falsely said they saw American soldiers commit, and falsely described the conditions of the American prisoners of war as good. They testified to the use of germ warfare by the United States and, describing the American system of government as "fascistic", declared that life was better in China than in the United States (Findings 8, 9, 10, 11, 14, 19, 20, 27, 28; R. 48-51, 53, 55-56).

Petitioners consorted and mixed socially with enemy troops. They attended parties, visited Chinese company and regimental headquarters frequently, and

circulated with the Chinese officers, both inside and outside the prison camp. Petitioner Cowart lived in the Chinese regimental headquarters for some time (Findings 13, 22, 29; R. 50, 54, 57).

Each of the petitioners declared his hostility to the United States and pledged his adherence to the cause of the enemy. Petitioner Griggs wore a Chinese medal; Bell and Cowart wore the Chinese uniform and Chinese medals (Findings 25, 13, 21; R. 55, 50, 54). Bell stated that he wished to fight for China and against the United States, and had attempted to join the Chinese Army (Finding 12; R. 50). Cowart stated that he wished to study in China and then return to the United States to help in the overthrow of the American government (Finding 23; R. 54). Griggs stated that, if given a weapon, he would fight the forces of the United Nations in Korea, and expressed the willingness to "sell out" the United States for "a tailor-made cigarette" (Finding 28; R. 56). Each of the petitioners refused repatriation when it was offered after the signing of the Korean armistice, and elected to go to Communist China (Findings 16, 24, 30; R. 52, 54, 57).

Petitioners were administratively discharged from the United States Army in January 1954. They returned to the United States in July 1955 (Findings 16, 24, 30; R. 52, 54, 57).

2. *Proceedings below*—On November 8, 1955, petitioners filed claims with the Department of the Army for pay and allowances (R. 30-31). Their claims were denied on October 2, 1956 (R. 31-32). On December 31, 1956, petitioners brought suit in the

Court of Claims for pay and allowances from the date of capture to discharge (Petition, paras. III, VII, and X; R. 1-3).

In the court below, petitioners introduced no evidence, did not testify, and stipulated the facts summarized above pertaining to their conduct during the period involved (R. 8-19). The Government offered testimony to prove the falsity of some of the propaganda charges pertaining to "germ warfare" and other alleged American misconduct, but petitioners agreed that the charges were false (Finding 31; R. 57-58). The parties also stipulated that the net amounts due to petitioners, should their claims be allowed, would be as follows: Bell, $1,455.29; Cowart, $4,991.13; Griggs, $2,810.14 (Finding 34; R. 58-59).

The court made findings and conclusions on the basis of the stipulation. After reviewing the evidence, the court stated in its opinion (R. 38, 40):

> These and many other acts of perfidy are abundantly proved by the record and are nowhere denied either in the pleadings or in the evidence. The record does not disclose any suggestion whatever of brainwashing. As a matter of fact, the record justifies the conclusion that at all times these men did these acts voluntarily for the purpose of helping themselves, in complete disregard of the effect it might have on the treatment of their fellow prisoners. The record does not indicate a touch of loyalty either to their compatriots or to their country after the period they were taken prisoners of war.
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> * * * *

> * * * The fact is that essentially they were not confined. They were permitted to go outside the camp, were given practical freedom and in the essence of things they were no longer in the status of prisoners.

Under these facts, the court held that petitioners were not entitled to pay under the Missing Persons Act, which was the only statute applicable to them, and therefore dismissed the petition (R. 39-40, 59).

SUMMARY OF ARGUMENT

By serving the enemy after capture, petitioners broke their oaths and obligations to render faithful service to the United States. Their right to the claimed pay for this period of disloyalty is dependent upon their bringing forward a statutory mandate to pay captured American soldiers even though they serve the enemy instead of this country. No such mandate exists.

I.

A. The Missing Persons Act does not confer the right to the pay in question upon petitioners. Since, under the undisputed facts found by the court below, petitioners were voluntarily serving the enemy after their capture, they could no longer be considered in the "active service in the Army * * * of the United States" within the meaning of the Act. 50 U.S.C. App. 1001, 1002, *supra*, p. 2. That Congress did not wish to pay all American soldiers captured by the enemy is shown by the specific provision that absentees and deserters *not* be paid under the Act; this

confirms the Congressional intent that pay is not earned by those who abandon their service and repudiate their allegiance to the United States by giving help to the enemy. Settled principles of military pay jurisprudence also support the result that servicemen who give up serving the United States—by desertion or by adherence to the enemy—are not entitled to pay. Nothing in the language or legislative history of the Missing Persons Act leads to a contrary conclusion.

B. Revised Statutes, Section 1288, which was originally enacted in 1814, covers the same subject matter as the Missing Persons Act—the right to pay of captured soldiers in the service of the United States. Any inconsistency or repugnancy between the two statutes should be resolved in favor of the Missing Persons Act, which is the later and more comprehensive expression of Congressional purpose. Since petitioners have no right to recovery under the Missing Persons Act, they cannot prevail in this case.

At any rate, there is no more indication that Congress intended to pay soldiers, for a period during which they served the enemy, under R. S. 1288 than under the Missing Persons Act. The controlling factor is that, since petitioners were in the service of the enemy, they were not "in the service of the United States" within the meaning of R. S. 1288. Further, the court below found that, essentially, petitioners were not prisoners following their capture, but were treated as adherents of the Chinese Communists; therefore, they were not in "captivity" and are entitled to nothing under R. S. 1288.

II.

The other arguments set forth in support of petitioners' claims are likewise without merit.

1. Administrative determination of a soldier's entitlement to pay is specifically directed by the statute in the situation presented by this case. 50 U.S.C. App. 1002, 1009, *supra*, pp. 2, 3-4. Moreover, comparable administrative determinations are regularly made by the Army, and have been approved by this Court. A.R. 35-1030; *United States* v. *Landers*, 92 U.S. 77; *United States* v. *Kingsley*, 138 U.S. 87. A court-martial or criminal conviction is not a prerequisite to a ruling that no pay is owing. None of the Court of Claims cases cited by petitioners are to the contrary. Since the question presented by this case is the petitioners' initial right to the pay, not the taking away of pay once concededly due, there is no question of penal forfeiture or the administrative deprivation of accrued pay. In any event, there was a *de novo* trial below, and the Court of Claims judicially found on the undisputed evidence that petitioners had performed the acts of disloyalty with which they were charged.

2. The Army has made no determination that petitioners are not entitled to pre-capture pay, and petitioners did not sue for such pay. The issue of pre-capture pay was not properly raised in the Court of Claims, and is not properly in issue here.

3. Finally, the court below correctly refused to set forth a generalized "standard of conduct" for captured servicemen. Petitioners were not prejudiced

by this refusal, since the record clearly establishes their disloyalty and their abandonment of service to the United States. Petitioners, who stipulated the facts of their disloyalty and who did not testify in their own behalf, failed to establish their right to recovery. That is sufficient for this case. The Court of Claims was not required to rule on possible cases of disloyalty not presented by this record or on the cases of military personnel guilty of misconduct which does not amount to service to the enemy. Such instances are not before the Court and need not be decided.

ARGUMENT

Under the undisputed facts found by the Court of Claims, the petitioners gave aid and comfort to the enemy during a period of hostilities by informing on loyal prisoners, by attempting to lead them in enemy-oriented study groups, by engaging in enemy propaganda activities, and by renouncing allegiance to the United States and pledging support to the cause of the enemy. There is no indication on this record that petitioners' conduct was in any way coerced, and the record fully justifies the conclusion of the court below that their actions were voluntary (R. 38). Indeed, the fact that petitioners rejected repatriation and chose instead to go to Communist China makes clear their voluntary renunciation of allegiance to the United States. Accordingly, petitioners' actions, as revealed by the record and findings, not only constituted wilful breaches of their obligations to render

faithful service to the United States,[2] but also appears to have amounted to the military equivalent of treason.[3]

This case, therefore, is one in which the petitioners claim pay as soldiers from the United States for the time during which they admittedly served the enemy as informers, squad monitors, and propagandists. They assert no contractual or common law right to this pay, and we are aware of none. Any recovery on their part must be based upon statutory entitlement. If Congress directed that they should be paid in the circumstances presented by this record, they are entitled to recover; but if, on the other hand, Congress did not provide that they should receive pay, they have no valid claim. The question in the case, then, is one of statutory interpretation, and the function of this Court "is to construe the language so as to give effect to the intent of Congress." *United States* v. *American Trucking Associations*, 310 U.S. 534, 542.[4] As we now show, there was no Congres-

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[2] "I, ..., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice." 10 U.S.C. 501; see *Billings* v. *Truesdell*, 321 U.S. 542, 550.

[3] See Art. 104 of the Uniform Code of Military Justice, 10 U.S.C. 904; *United States* v. *Dickenson*, 6 USCMA 438, 20 CMR 154; *United States* v. *Batchelor*, 7 USCMA 354, 22 CMR 144; see, also, Art. 105 of the Code, 10 U.S.C. 905.

[4] Authorities which exalt "plain meaning" or "literal construction" over the manifested purpose and intent of Con-

sional purpose to grant pay to captured American soldiers who serve the enemy.

I.

Captured American Soldiers Who Serve the Enemy Do Not Possess a Statutory Right to Pay for That Period

A. *The Missing Persons Act does not grant the claimed pay to petitioners.*

1. The Missing Persons Act[5] is comprehensive legislation governing the entitlement to pay and allowances of servicemen (and their dependents) who are missing, besieged, interned, or captured. Originally passed in 1942 as temporary legislation,[6] the Act was amended and reenacted several times,[7] and ultimately became permanent.[8] It provides that any person "in the active service * * * who is officially determined to be absent in a status of * * * captured by a hostile force" is entitled to pay and allowances. 50 U.S.C. App. 1002, *supra*, pp. 2-3. The term "active service"

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gress have lost any vitality they once may have had. *Boston Sand Co.* v. *United States*, 278 U.S. 41, 48; *United States* v. *American Trucking Associations, supra; United States* v. *Dickerson*, 310 U.S. 554; *Harrison* v. *Northern Trust Co.*, 317 U.S. 476; compare Petitioners' Brief, pp. 18-22.

[5] 50 U.S.C. App. 1001, *et seq.*, *supra*, pp. 2-4.

[6] Act of March 7, 1942, 56 Stat. 143. See S. Rep. No. 1060, and H. Rep. No. 1680, 77th Cong., 2d Sess.

[7] Act of July 1, 1944, 58 Stat. 679; Sec. 4(e) of Selective Service Act of 1948, 62 Stat. 608; Act of July 3, 1952, 66 Stat. 330, 331; Act of April 4, 1953, 67 Stat. 20-21.

[8] Act of August 29, 1957, 71 Stat. 491.

is defined as "active service in the Army * * * of the United States." 50 U.S.C. App. 1001, *supra*, p. 2.

As we have emphasized, the court below found as a fact that between the time of the petitioners' capture and the time of their discharge each of them "adhered to, worked for, and collaborated with the enemy of the United States" (R. 36). In other words, during their detention petitioners were in the service of the enemy, rather than in the service of the United States. Since they were in the service of the enemy, petitioners were not persons in "active service in the Army * * * of the United States * * * captured by a hostile force", and therefore are not entitled to pay even under the literal words of the Missing Persons Act. 50 U.S.C. App. 1001, 1002, *supra*, p. 2.

2. That Congress did not intend to pay American servicemen for a period during which they served the enemy is apparent from more than the bare language of the Missing Persons Act. It is difficult to see how the grant of pay to such individuals would provide for the common defense, or promote the general welfare, or advance any legitimate national policy or interest. Rather, a construction of the Act which would grant pay to such persons would lead to the incongruous result that soldiers who actually fight in the enemy's army, after capture, would also be entitled to pay under the Act. The intention to enact such legislation should not lightly be attributed to Congress, particularly in the absence of compelling statutory language or legislative history.

Although the Missing Persons Act does not specifically address itself to the problem of those com-

paratively few American soldiers who in the manner of petitioners break their obligations and oaths to serve the United States faithfully, the Act does contain a further indication that such persons should not be paid. It specifically provides that "[t]here shall be no entitlement to pay" for deserters and others absent without authority. 50 U.S.C. App. 1002, *supra*, p. 3. In a real sense, the entire pattern of petitioners' conduct after capture constituted an abandonment and desertion of their service and obligations to the United States.[9] But even if their service to the enemy did not constitute "desertion" or "absence without authority" within the technical definition of those terms, the fact that Congress precluded payment to absentees confirms its intent not to pay those whose derelictions are more reprehensible and more harmful to the United States than mere absence. Desertion or absence without authority results merely in the failure of the soldier to serve his country. But when petitioners entered upon their course of conduct, not only did the United States lose their services, but the enemy acquired additional strength. Petitioners' service to the enemy strengthened the enemy's control over loyal American pris-

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[9] The desertion or unauthorized absence for which the Missing Persons Act precludes pay need not antedate the serviceman's capture; it can commence after capture and while he is in the enemy's hands. For instance, soldiers who adhere to the enemy, after capture, and are therefore permitted by the enemy to leave the prison encampment and to live with the enemy (as was true of petitioner Cowart) seem to us clearly absent without proper leave from their post.

oners to their detriment,[10] and gave the enemy a valuable propaganda weapon which seriously harmed the United States. Indeed, while petitioners did not bear arms against the United States, it was apparently only because the enemy determined that petitioners would be more useful to its cause as propagandists, informers, and camp guards than as fighting soldiers.[11] It would be strange to ascribe to Congress an intention to treat those guilty of such activities more favorably than mere absentees. Neither the language nor the legislative history of the Act provides support for such an anomalous result.[12]

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[10] As a result of petitioner Bell's activities as an informer, one loyal American died, another was bayoneted, and others were punished in various ways (Finding 15; R. 51-52). Cowart's and Griggs' activities as informers were similar, and Griggs participated in imposing punishments on loyal prisoners (Findings 21, 26; R. 54, 55).

[11] Petitioners Bell and Griggs explicitly stated their willingness and desire to fight for the Chinese Communists against the United States and her allies (Findings 12, 28; R. 50, 56). Petitioner Cowart, who wore the uniform of the Chinese Communists, stated that he hated America and wished "to help in the overthrow of the [American] Government" (Finding 23; R. 54).

[12] It should be noted that, in 1957, Congress amended the Act to allow the payment of pay and allowances to Philippine Scouts who had been captured but later paroled by the Japanese during the occupation of the Philippines, with the proviso that no Scout who had performed "actions * * * of a military nature hostile to the United States" should receive such pay. 50 U.S.C. App. 1002(b). Congress inserted the proviso "so that the case could not arise whereby a former Philippine Scout who had collaborated with the enemy would receive the back pay and allowances authorized by this bill." H. Rep. No. 204, 85th Cong., 1st Sess., p. 5. Congress in-

Moreover, in ascertaining Congressional intent in this area, settled principles of military pay jurisprudence cannot be overlooked. This Court has held that a criminal breach, by desertion, of a soldier's obligation to render faithful service to the United States is a breach of his oath and contract of enlistment,[13] with the consequence that he is not entitled to pay for the period up to and including his desertion. *United States* v. *Landers*, 92 U.S. 77. In so holding, the Court observed (92 U.S. at 79):

> * * * the contract of enlistment * * * is for faithful service. The contract is an entirety; and, if service for a portion of the time is criminally omitted, the pay and allowances for faithful service are not earned. And, for the purpose of determining the rights of the soldier to receive pay and allowances for past services, the fact of desertion need not be established by the findings of a court-martial * * *.[14]

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tended not to pay "those Scouts found * * * to have demonstrated by their acts abandonments of their loyalty to the United States." *Id.*, p. 6.

[13] Of course, an enlistment is more than a contract of employment between private parties. *In re Grimley*, 137 U.S. 147; *In re Morrissey*, 137 U.S. 157. The differences, however, result from instances in which "private right is subordinated to the public interest." 2 Winthrop, *Military Law and Precedents* (2d ed.) 829-30.

[14] It is important to stress that in *Landers* the Court specifically held that it was unnecessary to have a court-martial conviction for desertion in order to preclude the deserter from receiving pay for the past period, *i.e.*, for the period prior to and including the time of desertion. The Court did hold that a court-martial was necessary, under the prevailing legislation, for a forfeiture of *future* pay to be earned after the deserter had returned to service and been restored to duty.

The *Landers* holding, which is still in force (A.R. 35-1030), accords with the general principles of the common law governing contracts between private persons, for it is axiomatic that one who wilfully commits a material breach of a contract can recover nothing under it. 4 Williston, *Contracts* (1936 ed.) § 1022, pp. 2823-4; 5 Williston, *Contracts* (1936 ed.) § 1477; 5 Corbin, *Contracts* (1951 ed.) § 1127, pp. 564-5, see also *Restatement Contracts*, § 357 (1) (a). There is no indication in the legislative history that Congress intended the Missing Persons Act to achieve a result contrary to *Landers*. Since one who commits a wilful and material breach of his contract of enlistment by deserting is entitled to no pay under the general pay legislation as well as under the Missing Persons Act, it follows that petitioners, whose breaches were of like character but more serious and harmful, are entitled to nothing.

3. The Missing Persons Act provides that determinations as to status and entitlement to pay are to be made administratively by the head of the department concerned, or his delegate, and that such determinations are to be "conclusive". 50 U.S.C. App. 1009, *supra*, pp. 3-4. The Court of Claims has previously held that such determinations are binding upon the courts, at least if they are not shown to be arbitrary. *Moreno* v. *United States*, 118 C. Cls. 30, certiorari denied, 342 U.S. 814; see A. R. 35-1325. That holding is obviously in accord with the statutory language and purpose.[15]

[15] Any doubt as to the correctness of the Court of Claims' interpretation of the Act in this regard would be resolved

However, the decision in this case does not turn on the weight to be attributed to the administrative determinations adverse to petitioners, because (as we have shown above) on the *de novo* record made in the Court of Claims and that court's own findings petitioners do not come within the language or the purpose of the Act, and therefore are entitled to nothing under it. As the case comes to this Court, there need be no issue as to the reviewability or finality of administrative rulings. The court below has made its own determination on its own record. But it is appropriate to point out that Congress, in providing for administrative determination of eligibility under the Act, obviously did not require that a court-martial judgment (or other criminal conviction) be a prerequisite to denial of pay under the Act.

B. *Petitioners are not entitled to pay under R.S. 1288.*

1. The Missing Persons Act and the so-called Prisoners of War Act, R.S. 1288 (37 U.S.C. 242, formerly 10 U.S.C. (1952 ed.) 846), cover the same subject matter, and provide for the pay of captured American servicemen. As previously noted, the Missing Persons Act declares that "[a]ny person * * * in the active service [of the United States] * * * cap-

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by the subsequent legislative history. Although the *Moreno* case was brought to the attention of Congress, and the Act was amended in response to the decision (see fn. 12, *supra*), the provisions concerning the conclusiveness of the administrative decision were reenacted without change. 50 U.S.C. App. 1009; Act of August 29, 1957, 71 Stat. 491; S. Rep. No. 970, 85th Cong., 1st Sess., p. 4.

tured by a hostile force" shall be entitled to the same pay and allowances while in such a status as he would otherwise be entitled. 50 U.S.C. App. 1002. Similarly, R.S. 1288 which was enacted in 1814 (3 Stat. 115) and has remained on the books since that time, provides that any soldier "in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity * * * the same pay, subsistence, and allowance * * *" as he would otherwise be entitled. 37 U.S.C. 242, *supra*, p. 4. Since the Missing Persons Act is later in time, is comprehensive in scope, and includes within its provisions the whole subject matter of R.S. 1288, any inconsistency or repugnancy between the two statutes should be resolved in favor of the Missing Persons Act (see, *e.g.*, *Posadas* v. *National City Bank*, 296 U.S. 497, 503-505). For example, as the Court of Claims properly noted, the provision of the Missing Persons Act providing for "conclusive" administrative determinations must prevail over R.S. 1288, which is silent as to who should determine the soldier's rights (R. 40). If, as we have shown above (and petitioners apparently now concede [16]), petitioners are not entitled to the pay under the Missing Persons Act, they cannot prevail at all.

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[16] Although petitioners advanced the Missing Persons Act as a basis for recovery in the court below (see p. 10, plaintiffs' brief in the Court of Claims), and in the petition for certiorari to this Court (Pet. 9), they apparently now concede that it does not give them any right to the pay in question, since in their brief on the merits they urge only R.S. 1288 as the basis for recovery (Pet. Br. 10-34; see, particularly, *id.*, at 31).

2. At any rate, the provisions of the two statutes are consistent at least insofar as they pertain to petitioners' rights in this case, on the *de novo* record made in the court below. Virtually the same considerations apply to R.S. 1288 as to the Missing Persons Act. The former provides that a soldier "in the service of the United States * * * shall be entitled to receive" his pay. 37 U.S.C. 242, *supra*, p. 4. Since petitioners were in the service of the enemy after their capture, they were no longer "in the service of the United States" under R.S. 1288.[17] Again, R.S. 1288 provides for a soldier's pay only "during his captivity". 37 U.S.C. 242, *supra*, p. 4. The court below found, on the basis of the stipulated facts, that petitioners "were permitted to go outside the camp, were given practical freedom and in the essence of things they were no longer in the status of prisoners" (R. 40). This finding is warranted by the record (R. 11, 15, 18). This fact, plus petitioners' voluntary service to the enemy following their capture, as well as their refusal to leave the enemy when offered repatriation, show that following capture they were not in "captivity," but were in the voluntary service of the enemy. Since petitioners were not "in the service of the United States" *and* were not in "captivity" within the meaning of R.S. 1288, they are entitled to recover nothing under it. There is no more indication that Congress intended to pay soldiers under R.S. 1288 for a period during

[17] Petitioners have omitted this requirement of R.S. 1288 in their line-by-line analysis of the statute and the facts in this case (Pet. Br. 10-11).

which they served the enemy than under the Missing Persons Act.

II.

The Decision of the Court Below Neither Alters the Administration of Military Pay Statutes Nor Threatens the Security of Future Soldiers

1. Petitioners refer to the fact that the original determination not to pay petitioners for the period following their capture was made administratively, while even a court-martial cannot normally forfeit accrued pay (but only future pay).[18] The first answer to their objection to the administrative determination of petitioners' right to pay is that Congress unequivocally provided for such administrative determination in the Missing Persons Act. 50 U.S.C. App. 1009, *supra*, pp. 3-4. Moreover, administrative determinations that a serviceman is not entitled to pay are neither unprecedented nor unusual. On the contrary, the Army regulations provide for administrative determination, for pay purposes, of absence without authority even where there has been an acquittal by a court martial, or where the accused has not been brought to trial. A.R. 35-1030, para. 1. The administrative determination of desertion, to determine the right to past pay, has been approved by this Court. *United States* v. *Landers*, 92 U.S. 77; see *supra*, pp. 18, 19-20. Similarly, a soldier's right to pay for the period of detention by civil authorities if he is convicted for the civil offense, or if he is released without trial upon his promise to make restitution, is determined administratively. A.R. 35-1030, paras. 8 and 9.

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[18] See Art. 57, Uniform Code of Military Justice, 10 U.S.C. 857.

Petitioners also cite three earlier decisions of the Court of Claims for the proposition that determinations that a soldier is not entitled to pay cannot be made administratively. *Walsh* v. *United States*, 43 C.Cls. 225; *de L. Carrington* v. *United States*, 46 C. Cls. 279; and *White* v. *United States*, 72 C. Cls. 459. The first two hold merely that officers under charges awaiting court-martial are entitled under the governing legislation to allowances during the period before trial. The quoted passage from *White* (Pet. Br. 33-34) also must be read in the context of the situation there presented. In that case, a soldier who enlisted without knowledge that he was suspected of a crime was held by the civil authorities and charged with perjury, a charge which was later judicially determined to be unfounded. The Court of Claims found that he had served in the Army until precluded from doing so by circumstances beyond his control. On this finding, the court concluded that, under the applicable regulations, he was entitled to his pay for the period of his detention. The court indicated, however, that the result might have been different if the soldier had been aware of the charges pending when he enlisted, or if he enlisted to escape them. 72 C. Cls. at 465. Of course, in none of these three cases did any statute direct the Secretary of the Army to determine the soldier' rights administratively. Rather than being inconsistent with prior cases, the decision below approving the administrative determination follows the only judicial precedent truly bearing upon this case. *Moreno* v. *United*

States, 118 C. Cls. 30, certiorari denied, 342 U.S. 814 *supra*, p. 19.[19]

As part of the same argument, petitioners call the determination that petitioners were not entitled to pay a "forfeiture". There is, however, no forfeiture of pay once due. The sole question presented is petitioners' basic right to their pay—*i.e.*, whether they ever became entitled to it—not the taking away of pay already earned, accrued, or due. The distinction between a forfeiture, which is a criminal penalty normally requiring determination by a court-martial, and determination of the initial right to pay, which does not involve any criminal proceedings, has been clearly drawn by this Court. *United States* v. *Kingsley*, 138 U.S. 87; see also *United States* v. *Landers*, 92 U.S. 77, 79, *supra*, pp. 18-19.[20] As we have

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[19] In this connection, we stress again that, as this case comes to this Court, it does not involve an administrative determination adverse to petitioners which has been left unreviewed or reviewed only to decide whether the administrative findings were arbitrary. There was a *de novo* trial of the facts in the Court of Claims, and that tribunal made its own findings on the basis of the record before it. This Court is asked to decide this case on the basis of fresh judicial findings, not merely on the basis of a departmental finding. See *supra*, pp. 19-20.

[20] If petitioners had not been discharged from the Army and therefore could be tried and convicted by court-martial, they would not be entitled to the pay they claim here. Article 57 of the Uniform Code (see *supra*, pp. 22-23) forbids a court-martial to forfeit accrued pay and allowances, but the pay involved here was *not* accrued and its denial would not be a forfeiture. If petitioners had been convicted by court-martial, the Department of the Army could properly refuse to pay them the amounts claimed here, as not being

noted, an administrative determination, subject to review by the courts, is the normal method of determining a soldier's right to pay.

2. Petitioners insist that the question of pre-capture pay was presented to the court below and is in issue here (Pet. Br. 23, fn. 7, 25-6, fn. 8). On the date of their capture, each of the petitioners had a balance due him, as follows: Bell, $3.32, Cowart, $39.34, and Griggs, $63.33 (R. 62, 60, 61). The Department of the Army determined only that petitioners were not entitled to their pay "for the period beginning with their respective dates of capture through the date they were given Dishonorable Discharges" (R. 32). Similarly, in their pleadings in the Court of Claims, petitioners claimed pay and allowances only from the date of their capture until the date of their discharge (R. 1, 3). All of the judges in the court below, including the dissenting judge, understood that this case was limited to petitioners' claims for pay from the date of capture until the date of discharge (R. 33, 44). In these circumstances, it seems clear that petitioners did not properly raise the issue of pre-capture pay in the court below,[21] and that the issue therefore is not ripe for

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due to them at all. Judge Madden's suggestion to the contrary (R. 45-46) is solely based on his view that the pay had accrued—a position which we, of course, challenge as the basic error of his dissent.

[21] It is true that the parties below stipulated, after the record was closed, the amounts due to petitioners if they should prevail, and that these amounts included the small sums of pre-capture pay; the record was reopened for the

decision by this Court. At any rate, the pre-capture pay can be treated in the same manner as post-capture pay, under the reasoning of this Court and the Army regulations. *United States* v. *Landers*, 92 U.S. 77, *supra*, pp. 18-19; A.R. 35-1030, para. 4.

3. Petitioners also argue that the court below failed to establish a "standard of conduct or care" (Pet. Br. 28-30), and that the security of "future servicemen" is therefore threatened. These arguments are without merit. All that was before the court below was the question of the right of these petitioners to the pay which they claimed on this record which showed their adherence to the enemy and their rejection of service to this country. The court did not have before it a case involving criminal conduct of a type not related to adherence to the enemy (*e.g.*, ordinary murder, theft, or assault), and was therefore not required to decide in what circumstances such criminal conduct (unrelated to serving the enemy) could amount to abandonment of service to the United States. Here, the decisive element was the record of petitioners' adherence to

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purpose of receiving this stipulation (R. 19-20, 60-62). Thus, the amounts of the pre-capture pay were included in the record. However, this single reference to pre-capture pay, as part of a general computation designed to assess damages if petitioners prevailed on their whole claim, was inadequate to present the separate issue of pre-capture pay to the court below, particularly in view of the fact that pre-capture pay was not distinctly discussed in the briefs. The only reference in petitioners' brief to which we have been referred is, at best, ambiguous. See plaintiffs' brief in the Court of Claims, p. 15.

the enemy. Even as to that area, the court below was justified in not attempting to specify exactly what other disloyal conduct would be non-compensable under the statutes involved here. The line between loyalty and disloyalty in a prison camp may not always be an easy one to draw. Wherever that line may be drawn, however, the petitioners' conduct, as revealed by the record in this case and found by the Court of Claims, clearly establishes their disloyalty and their abandonment of their service and allegiance to the United States.

4. The Court of Claims noted in its opinion that, as claimants against the Government, petitioners were required to establish their right to recovery (R. 43). This is, of course, the normal rule. But petitioners claim that the burden placed upon them is harsh and inequitable because of their asserted lack of funds (Pet. Br. 26-28). It is difficult to understand how petitioners can make this contention in view of the fact that they elected not to testify in their own behalf. If, as they now imply, their demonstrated disloyalty to the United States did not commence upon capture or was somehow excusable, they had an opportunity to present their version of the events to the court below. By stipulating that they engaged in activities which gave aid and comfort to the enemy—without any qualification as to the time at which the disloyalty began, and without any suggestion of excuse—petitioners are not in a position to raise questions of burden of proof at the present stage, or to complain of the inferences which

the Court of Claims, as the finder of fact, drew from the stipulation.[22]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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DECEMBER 1960.

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[22] The stipulation indicates that Bell began to act as a squad monitor approximately one month after his capture (R. 8). The stipulation is silent as to when his other disloyal activities took place, as it is silent in regard to the precise time of the activities of Cowart and Griggs.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 92.

OTHO G. BELL (1), WILLIAM A. COWART (2), LEWIE W. GRIGGS (3),
Petitioners,

vs.

THE UNITED STATES,
Respondent.

PETITIONERS' REPLY BRIEF.

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Subject Index

	Page
Desertion and unauthorized absence are irrelevant to the issues involved in this case	1
Landers, Kelley and Kingsley cases	6
Repeal by implication	13
Was the refusal of the Department of the Army to pay petitioners a forfeiture?	17
Decision of court below	18
Precapture pay	20
Conclusion	21

Table of Authorities Cited

Cases	Pages
Dickenson v. Davis, 245 U.S. 317	23
Ex Rel. Hirshberg v. Cook, 336 U.S. 210	5
F. de Carrington v. The United States, 46 Ct. Cl. 279	6
Fullinwider v. Southern Pacific Railroad Company, 248 U.S. 409	5
In re Grimley, 137 U.S. 147	23
In re Morrissey, 137 U.S. 157	23
Lewis v. The United States, 92 U.S. 618	15
Peiffer v. United States (1943) 96 Ct. C. 344	6
Petition of Provoo, 17 F.R.D. 183, 350 U.S. 857	5
Posadas v. National City Bank, 296 U.S. 497	14, 15

Pages

Standard Oil Company v. United States, 153 Fed. 2d 1958, 962 22

U. S. v. Blanton, 7 U.S.C.M.A. 664, 23 C.M.R. 128 23

United States v. Brook, 169 Fed. 2d 840 22

United States v. Chase, 135 U.S. 255 16

United States v. Kelley, 15 Wall. 34 ..... 6, 8, 9, 10

United States v. Kingsley, 138 U.S. 87 ..... 6, 12, 16, 17

United States v. Landers, 92 U.S. 77 ..... 6, 7, 8, 9, 10, 21

U. S. v. Williams, 302 U.S. 46 23

Walsh v. The United States, 43 Ct. Cl. 25 6

White v. United States (1931), 72 Ct. Cl. 459 6

Statutes

Prisoner of War Act:
R.S. 1281 12
R.S. 1288 ..... 7, 12, 14, 15, 19

56 Stat. 143 14

Uniform Code of Military Justice, 1951:
Article 3-a 5
Article 13 (10 USC 813) 7
Article 56 (10 USC 856) 7, 10
Article 57 (10 USC 857) 6
Article 85—Desertion (10 USC 885) 3, 16
Article 86 (10 USC 886) 2, 16
Articles 104 and 105 (10 USC 904, 905) 2, 3, 16

10 USC 813 10

10 USC 846 ..... 14, 15

10 USC 857 10

10 USC Appendix 1002 3

37 USC 242 ..... 15, 18, 21, 22

50 USC Appendix 1002 ..... 2, 4, 5, 7, 12, 14, 15, 16, 18, 21, 22

Texts

	Pages
13 A.L.R. 600	10
Statutory Construction, Crawford Law Book Co., 1940, page 195	5
Army Regulation 37-104, Section IV	6
Army Regulation 35-1030	6, 21
House Report No. 491, H.R. 4080, p. 5, 81st Congress, 1st Session	5
Manual for Courts Martial, U.S. Army, 1949:	
Page 197	3
Page 202	4
Manual for Courts Martial, 1951:	
Page 210	7
Page 310	3
Page 315	4

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vs.

THE UNITED STATES,
Respondent.

PETITIONERS' REPLY BRIEF.

Comes now the above named petitioners and in reply to the brief of the respondent on file herein respectfully submits the following.

DESERTION AND UNAUTHORIZED ABSENCE ARE IRRELEVANT TO THE ISSUES INVOLVED IN THIS CASE.

At page 15 of its brief, the respondent states:

"Although the Missing Persons Act does not specifically address itself to the problem of those

> comparatively few American soldiers who in the manner of petitioners break their obligations and oaths to serve the United States faithfully, the Act does contain a further indication that such persons should not be paid. It specifically provides that '[t]here shall be no entitlement to pay' for deserters[2] and others 'absent without authority.'"

Elsewhere throughout its brief the respondent attempts to compare the alleged misconduct of the petitioners with the military offenses of treason and unauthorized absence. Apparently this is done either in an attempt to bring this case within the prohibition of 50 USC App. 1002 against payment to missing or captured persons who absent themselves from their "post of duty" without authority, or to reconcile the facts of this case with other cases and Army Regulations dealing with unauthorized absence or desertion.

That the petitioners here were not and could not be guilty of the military offense of treason or absence

[1]The "comparatively few American soldiers" here referred to by the respondent constituted one-third of all captured American servicemen. Yet of all of these, including those convicted of the military equivalent of treason (Uniform Code of Military Justice 1951, Articles 104 and 105, 10 USC 904, and 10 USC 905), your petitioners are the only former prisoners of war that the government has refused to pay (see Brief of Petitioners, Footnote 12, page 28).

[2]This portion of 50 USC App. 1002 reads as follows:

> "That there shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority . . ."

It is noted that the section says nothing about desertion and limits itself to one of the four types of unauthorized absence—absence from post. (See Uniform Code of Military Justice, 1951, Article 86, 10 USC 886.)

from post is apparent from a reading of the *Articles of War*, the *Articles of the Uniform Code of Military Justice*, 1951, and the *Manual for Courts Martial*, 1951.

To be guilty of desertion there must be an unauthorized absence coupled with an intent to desert. Uniform Code of Military Justice Article 85—Desertion (10 USC 885); *Manual for Courts Martial, U.S. Army*, 1949, page 197; *Manual for Courts Martial*, 1951, page 310.[3] In this instant case there could be no unauthorized absence, thus there could be no desertion.

Since the petitioners were prisoners of war the United States had no physical control over them and thus could not and did not assign to them a "post of duty."[4] Additionally, since the petitioners were prisoners of war their movement was subject to the will of their captors.[5] It would appear that in all respects the petitioners were in the same position as a dishonorably discharged prisoner serving the sentence of a

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[3]The *Manual for Courts Martial U.S. Army*, 1949, was effective on February 1, 1949; the *Manual for Courts Martial U.S.*, 1951, was effective on May 31, 1951.

[4]10 USC App. 1002.

[5]That the Department of the Army did not and does not consider that the petitioners were in a status of absence is shown by a number of factors. First, the Army has never carried the petitioners on its rolls as absentees or deserters. Second, when the petitioners returned to the United States they were not charged with desertion or unauthorized absence, but were charged with violations of Articles 104 and 105 of the Uniform Code of Military Justice (supra). Third, the "head of the department concerned" has never made an official determination that the petitioners were "absent from (their) post of duty without authority". Such an official determination would be necessary under 10 USC App. 1002.

court martial. In this regard the *Manual for Courts Martial U.S. Army,* 1949, states at page 202:

> "A general prisoner whose dishonorable discharge has been executed has no 'command, guard, quarters, station or camp' within the meaning of Article 61, since he is in confinement not because of military duty but only because of compulsion. Accordingly, such a prisoner may not be charged with absence without leave under Article 61. . . ."

Since the petitioners were not and could not be in a status of absence or desertion, that provision of 50 USC App. 1002 relative to a person "absent from his post of duty" has no application to the petitioners' claim and is not a condition of their entitlement under the act.[6]

The fact that Congress expressly excluded from entitlement under 50 USC App. 1002 persons who absented themselves from their "post of duty" and also excluded Philippine scouts who "demonstrated by their acts abandonment of their loyalty to the United States"[7] does not in any way demonstrate that Congress also intended to exclude American

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[6] In Footnote 9, page 16 of its brief the respondent states:

> "The desertion or unauthorized absence for which the Missing Persons Act precludes pay need not antedate the serviceman's capture; it can commence after capture and while he is in the enemy's hands."

To your writer this is extremely doubtful since a prisoner of war has no post of duty. Undoubtedly the Congress in including this provision in the statute was referring to a soldier who was in the status of absent when captured, in which case he would be in the same circumstance as a soldier arrested by civil authority. (See *Manual for Courts Martial,* 1951, page 315.) The Congress could also have been referring to a soldier who absented himself after repatriation. In either event the same would have no application here.

[7] See Footnote 12, page 17, Brief of the United States.

Prisoners of War who misconducted themselves. In fact the inclusion of these two express exceptions demonstrates a Congressional intent not to exclude American Prisoners of War who misconducted themselves. By the two express exclusions, Congress has demonstrated that it was aware of the fact that all prisoners of war do not conduct themselves as they should. Congress enacted 50 USC App. 1002 during World War II. It re-enacted it after World War II and during and after the Korean War.[8] Congress was aware of the fact that American Prisoners of War in each of these two wars misconducted themselves,[9] yet it did not exclude them from entitlement in any of the re-enactments of 50 USC App. 1002.[10] By rules of statutory construction the exclusion of persons guilty of certain express types of misconduct, while aware of other types of misconduct, demonstrates a Congressional intent not to exclude persons guilty of the latter type of misconduct.[11]

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[8]See Footnotes 6, 7 and 8, page 14, Brief of the United States.

[9]During World War II there were a number of American prisoners of war who misconducted themselves. (See *Petition of Provoo*, 350 U.S. 857; *Hirshberg v. Cooke*, 336 U.S. 210; which latter case resulted in the Congressional enactment of Article 3-a of the Uniform Code of Military Justice, supra, see House Report No. 491, H. R. 4080, p. 5, 81st Congress, 1st Session.) Likewise during the Korean War there were many American prisoners of war who misconducted themselves. (See Brief of Petitioners, Footnote 12, page 28, and Footnote 13, page 30.)

[10]The Congressional reasoning in not excluding American prisoners of war might have been predicated upon its awareness of "subtle brainwashing techniques" (descending opinion below R. 45) or that "the line between loyalty and disloyalty in a prison camp may not always be an easy one to draw" (Brief of the United States, page 28).

[11]*Statutory Construction*, Crawford Law Book Company, 1940, p. 195; *Fullinwider v. Southern Pacific Railway Company*, 248 U.S. 409, 412.

LANDERS, KELLEY AND KINGSLEY CASES.

The respondent relies heavily upon two cases in an attempt to circumvent the age-old principle of military law that there cannot be a forfeiture of military pay without the sentence of a court martial.[12]

The first of these cases is that of *United States v. Landers* 92 U.S. 77. The respondent quotes from the *Landers* case on page 18 of its brief but the quotation, taken out of context, as it is, is meaningless. The *Landers* case is readily distinguishable from the instant case in many particulars.

First: The *Landers* case was a case involving "forfeiture of pay due to desertion." There are several Army Regulations which have special application to the pay of an absentee or deserter. These Regulations are peculiar to absence offenses and have absolutely no application to any other military offense.[13] Thus,

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[12]See *Peiffer v. United States* (1943) 96 Ct. C. 344; *F. de Carrington v. United States* (1911) 46 Ct. C. 279; *Walsh v. United States*, 43 Ct. C. 225 at 231; *White v. United States* (1931) 72 Ct. C. 459.

[13]Army Regulation 35-1030 authorized the forfeiture of the pay of an absentee during the period of his absence. However, it is stressed that this Army Regulation applied only to absentees and did not apply to any other offense. On December 2, 1957 A.R. 35-1030 was superseded by A.R. 37-104, Section IV.

It is interesting to compare A.R. 35-1030 which was promulgated by the Secretary of the Army with Article 57 of the Uniform Code of Military Justice 1951 (10 USC 857) which was enacted by Congress. This Congressional act provides in part:

> "Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date the sentence is approved by the convening authority.

even if the *Landers* case did authorize "forfeiture" without a court martial for desertion, the decision would have no application to the instant case, as your petitioners were not, and could not, be guilty of desertion (see supra, page 3).

Second: The *Landers* case did not deal with an administrative forfeiture. It dealt with a forfeiture imposed by sentence of a court martial. The court at page 80 states:

> "We must, therefore, presume, as the case is presented to us, that the petitioner was brought to trial for his offense before such a court, and was convicted, and that the forfeiture imposed was the sentence of the court."

The petitioner in the *Landers* case did not contest the validity of the forfeiture (*Landers* supra, page 80) but contended that his restoration to duty and subsequent honorable discharge purged the previous sentence by court martial and thus he was entitled to the

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No forfeiture may extend to any pay or allowances accrued before that date."

This statute would clearly preclude any forfeiture of any pay without a court martial. Thus this section is in accord with the principles of military law stated by the Court of Claims in the various cases cited in Footnote 12, supra. Likewise this section would preclude a construction of 50 USC App. 1002 or R.S. 1288 in such a way as to deny the petitioners their pay.

See also Article 13 of the Uniform Code of Military Justice 1951 (10 USC 813) which states in part:

> "Subject to Section 857 of this title (Article 57), no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him. . . ."

Since forfeiture of pay is one of the penalties mentioned in Article 56 Uniform Code of Military Justice 1951 (10 USC 856) and in the *Manual for Courts Martial* 1951 (page 210) a forfeiture of pay prior to a court martial would be clearly invalid.

pay forfeited by the sentence of the court martial. The court held at page 80:

> "Assuming that the conduct of the soldier in this case, subsequent to his restoration to duty, may have entitled him to an honorable discharge, and that such discharge was not inadvertently granted, the discharge could not relieve him from the consequence of the judgment of the military court, and entitle him to the pay and allowances which the court had adjudged to have been forfeited."

In fact the court distinguished the *Landers* case from *United States v. Kelley* (infra) on the basis that Landers' forfeiture was a court martial sentence while Kelley's was administrative. See page 80:

> "In Kelley's case, as already stated, the deserter was restored to duty without trial, upon his voluntary return; and it was with reference to a case of that kind that the Judge-Advocate General gave the opinion, which is cited with approval by this court. In such a case, an honorable discharge of the soldier, as held by that officer, dispensed with any formal removal of the charge of desertion from the rolls of his company, and amounted of itself to a removal of any impediment arising from the fact of desertion to his receiving bounty."

Third: In footnote 14, page 18, of its brief, the respondent states:

> "It is important to stress that in *Landers* the Court specifically held that it was unnecessary to have a court-martial conviction for desertion in order to preclude the deserter from receiving pay

> for the past period, i.e., for the period prior to and including the time of desertion."

The court did not so hold, or if it did so hold, the holding is purely dicta, as Landers was in fact court-martialed.

It is more likely that the court in using the term "forfeiture," is using it in the sense of "checking" pay. It is noted that the court states, page 79:

> ". . . it is sufficient to justify a *withholding* of the monies that the fact appears upon the muster-rolls of his company." (Emphasis added.)

By use of the term "withholding" the court implies that if the person is subsequently acquitted of the absence or desertion his pay would be restored to him.

This reading of the case is further bolstered by the next sentence which reads:

> "If the entry of desertion has been improperly made, its cancellation can be obtained by application to the War Department."

Likewise, this reading of the case is bolstered by the language on page 80 where the court distinguishes the *Landers* from the *Kelley* case on the basis of the court martial.

Fourth: On page 19 of its brief the respondent states:

> "The Landers holding, which is still in force . . ."

This statement is only accurate in the sense that Army Regulations permit forfeiture of pay during a period

of absence (see Footnote 13 supra). There is absolutely no authority anywhere in any of the Federal statutes for "forfeiture" of pay without a court martial for anything other than possibly an absence offense, and in fact the law expressly excludes such forfeitures (see Footnote 13 supra).[14] We are not here dealing with an absence offense.

Fifth: The *Landers* case cites with approval the case of *United States v. Kelley,* 15 Wall 34. Both the *Landers* case and subsequent authorities[15] cite the *Kelley* case for the general principle of law, and cite the *Landers* case for the exception. The general principle's law in the *Kelley* case is in accord with all the prior and subsequent precedent to the effect that it takes the sentence of a court martial to forfeit pay,[16] and that pay cannot be forfeited by the Administrative Act of the Department of the Army.[17]

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[14]If the *Landers* decision were construed so as to authorize a "technical forfeiture" rather than a "withholding of pay" prior to trial, it probably would not be good law today even for an absence offense. As seen in Footnote 13 (supra) a court-imposed forfeiture is only effective from the date of sentence, and you cannot punish a serviceman prior to trial.

In addition, Article 56, Uniform Code of Military Justice (10 USC 856) provides in part:

> "A court shall not, by a single sentence which does not include dishonorable or bad conduct discharge, adjudge against an accused: Forfeiture of pay at a rate greater than two-thirds of his pay per month. Forfeiture of pay in an amount greater than two-thirds of his pay for six months."

In the *Landers* case the court (1) forfeited more than two-thirds pay without giving a dishonorable discharge or a bad conduct discharge, and (2) apparently forfeited pay in an amount greater than two-thirds for more than six months.

[15]13 A.L.R. 600.

[16]See Footnote 12.

[17]10 USC 857; 10 USC 813.

The second case that the respondent cites to overcome the principle of no forfeiture without court martial is the case of *United States v. Kingsley*, 138 US 87. In the *Kingsley* case the petitioner was administratively discharged from the Marine Corps as a person of bad character. After his discharge he sued in the Court of Claims for "retained pay" and "travel pay." Retained pay was special pay which "shall not be paid to the soldier until his discharge from the service and shall be forfeited unless he serves honestly and faithfully to the date of his discharge." The court held, page 90:

> "To entitle the soldier to his retained pay it is therefore necessary to show, first, his discharge from the service; second, an honest and faithful service to the date of his discharge."

And the court held, page 92:

> "This record shows a clear case of failure to furnish the honest and faithful service demanded by the statute."

Thus the holding in the *Kingsley* case is simply that the plaintiff has not earned the retained pay since he had not performed one of the "condition precedents" necessary to entitlement. Since he had not earned the pay he could not have "forfeited" it, since you cannot forfeit something you don't own. The court's holding is to the effect that the term "forfeited" as used in the act is used in a non-technical "sense of a disability incurred by non-performance of a contract." (Page 90.) The court stated, page 91:

"Indeed, the word in this connection means nothing more than an incapacity to recover . . ."

The *Kingsley* case is readily distinguishable from the instant case.

First: In the instant case there is no "condition precedent" of "honest and faithful" service in either 50 USC App. 1002 or R.S. 1288 unless we put it there by judicial legislation. Since there are no words of "incapacity to recover" in the statutes involved in the instant case, the refusal to pay is a forfeiture in the "technical sense."

Second: The court in the *Kingsley* case is dealing with a special pay given in addition to regular pay as a reward for a certain type of service (viz. honest and faithful service). This pay was only due and payable (viz. accrued) upon discharge. In the instant case we are dealing with regular pay earned before and after capture which is due and payable (viz. accrued) daily and is paid bi-monthly. A discharge is not a condition of entitlement. The "non-technical forfeiture" in the *Kingsley* case was not retroactive. The "technical forfeiture" in the instant case is retroactive.[18] The *Kingsley* case rather than being in conflict with the petitioners' entitlement under 50 USC App. 1002, bolsters their

[18]One collateral facet of the *Kingsley* case is of interest here. It is noted that the Congress in enacting R.S. 1281 conditioned entitlement to retained pay upon "honest and faithful service". This demonstrated that the Congress was aware of the fact that certain servicemen do not render honest and faithful service. Yet in enacting R.S. 1288 (Prisoner of War Act) at or about the same time, Congress did not condition entitlement to "honest and faithful service". Does this not demonstrate an intent not to have such a condition precedent in the Prisoner of War Act?

claim. After discussing the retained pay the court goes on to discuss the travel pay. The travel pay was not conditioned on honest and faithful service, but was conditioned on a discharge, except by way of "punishment for an offense." The court held, page 92:

> "We think this statute contemplates a discharge as a punishment inflicted by the judgment of a court martial or other military authority, for a specific offense, and not such a discharge as was issued in this case, for unfitness for service and general bad character. While this may justify the proper authorities in ordering the discharge of the soldier as a worthless member of the service, we cannot consider such a discharge as 'a punishment for an offense' within the meaning of the statute. The question whether such punishment must necessarily be awarded by the judgment of a court martial, is not presented by the record, and we express no opinion upon the point."

But suppose there had been no condition at all on entitlement in the pay, as in the instant case. Certainly then, would not the court have agreed with the Court of Claims and held that this was a "technical forfeiture" requiring the sentence of a court martial?

REPEAL BY IMPLICATION.

On page 21 of its brief the respondent states:

> "Since the Missing Persons Act is later in time, is comprehensive in scope, and includes within its provisions the whole subject matter of R.S. 1288, any inconsistency or repugnancy between the two

statutes should be resolved in favor of the Missing Persons Act. (See e.g., *Posadas v. National City Bank*, 296 US 497, 503-505)."

The holding of the *Posadas* case at page 503 is as follows:

> "The *cardinal* rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication: (1) where provisions in the two acts are in irreconcilable conflict, the latter act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the latter act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. *But, in either case, the intention of the legislature to repeal must be clear and manifest;* . . ." (Emphasis added.)

There is no irreconcilable conflict or repugnancy between R.S. 1288 and 50 USC App. 1002. Therefore, if there is to be a repeal by implication because 50 USC App. 1002 covers the whole subject of R.S. 1288, the "intention of the legislature to repeal must be clear and manifest." Considering the "cardinal rule is that repeals by implication are not favored," can it be said that Congress clearly intended to repeal R.S. 1288? Each of the acts were re-enacted several times. On several occasions R.S. 1288 was re-enacted after 50 USC App. 1002. For instance, 50 USC App. 1002 was originally enacted in 1942. (56 Stat. 143.) R.S. 1288 was re-enacted in 1952 as 10 USC 846. 50 USC

App. 1002 was re-enacted in 1951, 1952 and 1953.[19] 10 USC 846 was apparently re-enacted in 1956 when it became 37 USC 242.

In applying the second exception to the "cardinal rule" as mentioned in the *Posadas* case (supra), the critical date would be November 8, 1955, the date upon which the petitioners filed their claim. Considering the many re-enactments of each of the sections, it would be rather difficult to say which of the statutes was "later" on that date. In any event, it would be rather absurd to state that, on the last re-enactment of 50 USC App. 1002 prior to November 8, 1955, the Congressional intent to repeal R.S. 1288 by implication was "clear and manifest" since Congress again re-enacted R.S. 1288 in 1956.

Even if we were to violate the "cardinal rule" by repealing R.S. 1288 by implication, the respondent would not be benefited. The Missing Persons Act 50 USC App. 1002 does not contain a condition precedent of honorable and faithful service which a plaintiff must establish. To put such a condition in 50 USC App. 1002 is to violate a cardinal rule of statutory construction. It is a basic rule of construction that a court cannot interpolate a condition into a statute.[20]

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[19] See Footnote 7, page 42, Brief of the United States.

[20] *Lewis v. United States*, 92 U.S. 618, 621 held:

"Where the language of a statute is transparent, and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe."

Also see *Lewis v. United States* (supra); page 623:

"Neither statute contains any qualification, and we can not interpolate none. Our duty is to execute the law as we find it; not to make it."

It is the duty of the court to execute the law, not to make it.[21]

The respondent's repeated attempts throughout its brief to compare the alleged misconduct of the petitioners with the military offense of desertion and to reconcile such offense with the condition in 50 USC App. 1002 against payment to those who absent themselves from their "post of duty" is a solicitation to this court to indulge in judicial legislation. The alleged misconduct of your petitioners, if anything, is a violation of Articles 104 and 105 of the Uniform Code of Military Justice. (10 USC 904 and 10 USC 905.) These are articles which deal with "aiding the enemy" and "misconduct as prisoners." There is absolutely no similarity between these articles and Article 85 (desertion) and Article 86 (absent without leave) Uniform Code of Military Justice, 1951 (supra).

As heretofore seen (supra page 3) the petitioners were not and could not be guilty of desertion or absence from "post of duty." The question then becomes one of whether the court is going to add to 50 USC App. 1002 another condition precedent of honorable and faithful service. It would seem that the language of the court in *United States v. Chase*, 135 US 255, at page 262, is particularly appropriate here:

"Ashurst, J., said in *Jones v. Smart*, 1 TR 51:
'It is safer to adopt what the legislature have

[21] The petitioners concur with the respondent's statement (page 23, Brief of the United States) that the distinction between accrued and non-accrued pay was clearly drawn in the *Kingsley* case (supra). In fact the basis of the decision on the question of "retained pay" was that the petitioner had not complied with a condition precedent and thus the pay was not accrued.

actually said than to suppose what they meant to say.' In the Queensborough cases, 1 Blight, 497, Lord Redesdale said: 'The proper mode of disposing of difficulties arising from a literal construction is by an act of Parliament, and not by the decision of court.'"

WAS THE REFUSAL OF THE DEPARTMENT OF THE ARMY TO PAY PETITIONERS A FORFEITURE?

At page 25 of its brief the respondent states:

> "There is, however, no forfeiture of pay once due. The sole question presented is petitioners' basic right to their pay—i.e., whether they ever became entitled to it—not the taking away of pay already earned, accrued, or due."

And in footnote 20, page 25, the respondent states:

> "... but the pay involved here was *not* accrued and its denial would not be a forfeiture." (Emphasis theirs.)

It is rather difficult to follow the respondent's reasoning in this regard. Military pay is accrued daily and paid bi-monthly unless there is some condition in addition to putting in time. For instance, in the *Kingsley* case, there was a condition precedent to entitlement to retained pay of a receipt of a discharge. Likewise there was a condition precedent to entitlement to travel pay of receipt of a discharge "except by way of punishment for an offense." The same is true nowadays in the case of mustering-out pay, accrued leave pay, and travel pay. The pay is not accrued or earned until the soldier obtains his discharge.

It is noted that 50 USC App. 1002 states:

"... be entitled to receive or to *have credited to his account* the same pay and allowances to which he was entitled at the beginning of such period of absence or *may become entitled thereafter*..?" (Emphasis added.)

37 USC 242 uses the terms:

"... *shall be entitled to receive during his captivity*, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled, while in the actual service of the United States;" (Emphasis added.)

These are certainly words of present grant.

In the instant case the plaintiffs are claiming regular pay and combat pay which accrued daily from a period prior to their capture until the date of their discharge.

DECISION OF COURT BELOW.

At page 15 of its brief the respondent states that the court below found as a fact that the petitioners "were not persons in 'active service in the army[22] ... of the United States ... captured by hostile forces'" and therefore not entitled to pay under 50 USC App. 1002. Again, on page 20 and in footnote 19, page 25, the respondent stresses that there was a *de novo* hearing below and implies that since there was a finding of fact by the court below that this court is precluded

[22]It is noted that 50 USC App. 1002 states only: "Any person who is in active service and who ..."

from reviewing such facts. This argument is unsound for two reasons.

First: The court below based its decision upon facts which the petitioners continually and repeatedly objected to as being irrelevant and immaterial. The petitioners have, since the filing of the respondent's answer, contended that their alleged misconduct (viz. adhered to, worked for, and collaborated with the enemy) was immaterial to the issues here involved. For this reason they did not attempt to rebut them. The single major question involved in this case is whether or not such alleged misconduct is relevant under each of the statutes involved. The relevance and materiality of the alleged misconduct is a question of law, not a question of fact, and is certainly reviewable by this court.

Second: The court below has held and the respondent argues,[23] that the petitioners' alleged misconduct establish the fact that the plaintiffs were not persons in active service of the Army of the United States. However, the respondent by its answer (R. 4, 5) and by the Stipulation of Facts (R. 8, 13, 16, 18) has ad-

[23] On page 22 of its brief the respondent states:

"Since petitioners were in the service of the enemy after their capture, they were no longer 'in the service of the United States' under R.S. 1288."

Then in Footnote 17, page 22 the defendant goes on to state:

"Petitioners have omitted this requirement of R.S. 1288 in their line-by-line analysis of the statute and the facts in this case."

From a casual reading of R.S. 1288 it is obvious that the term "service of the United States" as used in the statute refers to "privates of any militia or volunteer corps", and does not refer to every . . . private of the regular Army." The petitioners were privates of the regular Army.

mitted that the petitioners were privates first class in the United States Army and were captured. The lower court's own "findings of fact"[24] and the preliminary statement of facts at the beginning of the lower court's decision (R 33) show the petitioners as privates first class in the United States Army.

It is certainly within the province of an Appellate Court to review the findings of the lower court, when the lower court has repeatedly stated a thing to be a fact and then finds as a conclusion that it is not a fact.

The respondent also argues at page 22 that the petitioners were not in "captivity." The same reasoning that applies to whether or not the petitioners were in the service of the United States Army also applies to the question of captivity. (See pages 11, 12 and 13, Brief of Petitioners.)

PRECAPTURE PAY.

The respondent contends on page 26 of its brief that the petitioners' precapture pay is not an issue because the petitioners did not properly raise the issue. The petitioners have raised the issue of their regular pay and the combat pay on each occasion that they have demanded or discussed their claim for pay.

In their initial demand addressed to the Chief of Finance, Department of the Army, on November 8,

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[24] The court's own findings of fact states (R. 47):

"At the times of their capture as aforesaid the plaintiffs were privates first class in the United States Army."

The stipulation of facts states the same thing. (R. 18.)

1955,[25] the petitioners ask for "all their back pay." (R. 30.) In each pleading, stipulation and brief since that time they have demanded their precapture, combat and regular pay. (See Brief of Petitioners, footnote 3, page 14, and footnote 8, page 25.)

On page 27 of its brief, the respondent states:

> "At any rate, the pre-capture pay can be treated in the same manner as post-capture pay, under the reasoning of this Court and the Army regulations. *U. S. Landers,* 92 US 77, *supra* pp. 18-19; A.R. 35-1030, para. 4. . ."

As seen above (supra page 6) the *Landers* case has no relevancy to the issues here involved as it dealt with (1) a court-imposed forfeiture, (2) a forfeiture applicable only to absence offenses.

A.R. 35-1030 likewise deals only with forfeitures for absence offenses. Since the petitioners are not, and legally could not, be guilty of an absence offense, A.R. 35-1030 could have no application in the instant case.

CONCLUSION.

The respondent throughout its brief has attempted by various means to create conditions precedent in 50 USC App. 1002 and 37 USC 242 which are not in the

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[25] It is noted that 50 USC App. 1002 provides that the person shall "be entitled to receive . . . the same pay and allowance to which he was entitled at the beginning of such period of absence . . . ." In the petitioners' original demand for pay they demanded "all their back pay". To date the Army has paid them nothing. This would certainly seem to make the issue of the pre-capture pay a relevant and material issue in this case.

sections and were not intended to be in the sections. To accomplish this result it would have the court violate several cardinal principles of statutory construction. (See supra, page 15.)

In the event respondent is not successful in creating a new condition, it seeks to have the court repeal 37 USC 242 by implication when the legislature obviously had no intention of having it repealed. (See supra, page 13.) The respondent's purpose in attempting to repeal 37 USC 242 is to clear the way for an attempt to bring the petitioners within the exclusion in 50 USC App. 1002 dealing with absentees. But the petitioners are not and could not be considered absentees. To consider them as absentees, or to apply to them the laws applicable to absentees is to violate basic principles of military law. (See supra, page 3.)

In the event that all of the above are unsuccessful, the respondent seeks to have the court reconsider the "status of a soldier" and make that status akin to a common law master and servant relationship,[26] thereby

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[26] At page 19 of its brief, the respondent states:

"The *Landers* holding which is still in full force (A.R. 35-1030), accords with the general principles of the common law governing contracts between private persons, for it is axiomatic that one who wilfully commits a material breach of a contract can recover nothing under it."

The respondent then goes on to cite Williston *Contracts* and the *Restatement of Contracts*. However, see the holdings of the Courts of Appeal in the following cases:

Standard Oil Company v. United States, 153 Fed. 2d 1958, 962:

"We agree with the trial court, that the relationship between government and soldier is more legislative than contractual."

United States v. Brook, 169 Fed. 2d 840, 843:

upsetting the basic principles announced in *In re Grimley*, 137 US 147; *In re Morrissey*, 137 US 157; and *U.S. v. Williams*, 302 US 46.

And again, to accomplish his result the respondent would have the court upset the long line of cases and the statutes which hold that it takes a sentence of a court martial to forfeit pay.

What is the result desired by the respondent? The respondent desires that these three petitioners not be paid. Assuming, for the purpose of argument, that the petitioners do not deserve to be paid, does that justify the precedent which will be established by this case?

If the court were to adopt any of the various theories advanced by the respondent it would be sanctioning a unilateral, administrative, retroactive forfeiture of a serviceman's pay. The principle will go down in the books and will be available for use in the next case

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"The soldier, upon enlistment, acquires a special and unique military status, quite different from any relationship between the Federal Government and civilians."

Dickenson v. Davis, 245 U.S. 317, 319:

"Service in the military, whether by enlistment or otherwise, creates a status, which is not and cannot be severed by breach of contract, unfortified by a proper authoritative action."

See the decision of the United States Court of Military Appeals in *United States v. Blanton*, 7 USCMA 664, 23 CMR 128:

"An agreement to enlist in an Armed Service is often referred to as a contract. However, more than a contractual relationship is established, what is really created is a status. U.S. v. Grimley, 137 U.S. 147; U.S. v. Dickenson, 20 CMR 154. As a result, no useful purpose is served by reviewing the common-law rules of contract . . ."

which may involve the "ordinary murder, theft or assault" mentioned by the defendants on page 27 of its brief.

Dated, Castro Valley, California,
January 3, 1961.

Respectfully submitted,

ROBERT E. HANNON,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

No. 92.—October Term, 1960.

Otho G. Bell, et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Claims.

[May 22, 1961.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioners were enlisted men in the United States Army who were captured during the hostilities in Korea in 1950 and 1951. In the prison camps to which they were taken they behaved with utter disloyalty to their comrades and to their country. After the Korean Armistice in the summer of 1953 they refused repatriation and went to Communist China. They were formally discharged from the Army in 1954. In 1955 they returned to the United States. Later that year they filed claims with the Department of the Army for accrued pay and allowances. When these claims were denied they brought the present action in the Court of Claims for pay and allowances from the time of their capture to the date of their discharge from the Army.[1] The Court of Claims

[1] Each of the petitioners was dishonorably discharged by administrative order of the Secretary of the Army on January 23, 1954. The validity of these administrative discharges is not in issue here, since the petitioners have made no claim for pay and allowances after that date. Compare memorandum to the Chief of Staff from the Judge Advocate General of February 3, 1954, J. A. G. A. 1954/1627, with Opinion Memorandum for the Secretary of Defense from the General Counsel of the Department of Defense of January 25, 1954. See Pasley, Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court Martial? 41 Cornell L. Q. 545; Note, Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases, 56 Col. L. Rev. 709, 735.

decided against them, stating that "[n]either the light of reason nor the logic of analysis of the undisputed facts of record can possibly justify the granting of a judgment favorable to these plaintiffs." 181 F. Supp. 668, 674. Judge Madden dissented.[2] We granted certiorari to consider a seemingly important statutory question with respect to military pay. 363 U. S. 837.

The Court of Claims made detailed findings of fact with respect to the petitioners' conduct as prisoners of war, based upon a stipulation filed by the parties.[3] These circumstances need not be set out in minute detail. They are adequately summarized in the opinion of the Court of Claims, as follows:

> "[D]uring the period of their confinement each of the three plaintiffs became monitors for the 'forced study groups,' the sessions of which the prisoners were compelled to attend. Armed guards attended these sessions. The programs included lectures picturing what were declared to be the bad aspects of

[2] Judge Madden stated:

"It is noteworthy that after Congress abolished the historical power of courts-martial to forfeit accrued pay, the Army, apparently for the first time in history, forfeited the pay already accrued to these plaintiffs, not by the process of trial and sentence, which was forbidden by statute, but by the crude and primitive method of refusing to give them their money. Finding nothing in the law books to justify its refusal to pay these men, it threw the books away and just refused to pay them. It could have set before these confused young men a better example of government by law." 181 F. Supp., at 675.

[3] The petitioners did not stipulate that these facts were true, but did agree "that the facts hereinafter set forth shall, for the purposes of this case, be deemed to have been elicited from defendant's witnesses testifying under oath," and that "[t]he facts so elicited, and hereinafter set forth, have not been rebutted by plaintiffs or by plaintiffs' witnesses, and plaintiffs, and each of them, hereby waive the right to testify or to call witnesses to testify in rebuttal of these facts."

life in the United States as contrasted with idyllic life under communism. As monitors, they procured and distributed propaganda literature, and threatened to turn in names of any prisoners who refused to read and discuss favorably these propaganda handouts.

"Each of the plaintiffs made tape recordings which were used as broadcasts and over the camp public address system. Each of them wore Chinese uniforms and were permitted to attend meetings outside the camp. The details of the plaintiffs' consorting, fraternizing and cooperating with their captors and the devious ways in which they sought favors for themselves, thus causing hardship and suffering to the other prisoners, are set out in our findings. . . .

"Two of Bell's recordings were broadcast over the Peiping radio, stating among other things that on the orders of his platoon leader, his men had killed North Korean prisoners of war, and that President Truman was a war monger. In written articles for the camp newspaper he alleged that American troops had committed atrocities and he personally had been ordered to kill women and children and not to take prisoners of war, and that if given the opportunity he would run a tank over the President's body.

"Bell was paid money to write these articles. He also delivered lectures before his company and to the camp on American aggression. He appeared voluntarily in a motion picture and appeared in bimonthly plays. He stated that if given a weapon he would fight against the United States. He sold food intended for the sick to other prisoners of war. By making reports to the Chinese, he caused one man to be bayonetted and others to be placed in solitary confinement.

"Cowart did many similar things, wrote propaganda articles accusing American soldiers of atrocities and of using germ warfare. He drew posters and cartoons for the enemy, acted in plays, walked and talked with the Chinese officers, guards and interpreters, lived part of the time at Chinese regimental headquarters, stated he hated America, desired to study in China and to return to the United States in five years to help in the overthrow of the government.

"Griggs did many similar things, attended enemy parties, visited Chinese headquarters frequently, referred to the Chinese as comrades, was accorded special privileges, made broadcasts, signed leaflets, wrote articles accusing the American soldiers of atrocities and declared the United States had used germ warfare."

As stated in their brief, the petitioners "do not admit to the alleged acts of dishonor contained in the Stipulation and the Findings of Fact, but rather demur to them on the grounds that such facts are irrelevant and immaterial in a civil action for military pay provided by statute." The statute upon which the petitioners rely is an ancient one. It was first enacted in 1814 and has been re-enacted many times. It provides:

"Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled while in the actual service of the United States; but this provision shall

> not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law." 37 U. S. C. § 242.[1]

Although the plain language of this law appears to entitle the petitioners to their Army pay and allowances during their imprisonment in Korea, the Government has urged various grounds upon which we should hold that the provisions of the statute are inapplicable. We have concluded that none of the theories advanced by the Government can serve as a valid basis to circumvent the unambiguous financial obligation which the law imposes.

The Army's refusal to pay the petitioners was based upon an administrative determination that all prisoners of war who had declined repatriation after the Korean Armistice "advocate, or are members of an organization which advocates, the overthrow of the United States Government by force or violence."[2] In refusing to honor the

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[1] The statute was originally enacted on March 30, 1814, as § 14 of "An Act for the better organizing, paying, and supplying the army of the United States." C. 37, § 14, 3 Stat. 113, 115. The provision next appeared as R. S. § 1288. In the 1952 edition of the Code, it appeared at 10 U. S. C. § 846. Title 10, at that time, dealt with the Army and the Air Force. In the 1958 edition of the Code, the provision was transferred to Title 37, c. 4, which covers basic pay and allowances of military personnel.

[2] This position was set out in a letter from the Army Chief of Finance to the petitioners' lawyer, rejecting the petitioners' claims. The letter in its entirety read as follows:

2 October 1956

"Dear Mr. Brown:

"Further reference is made to your inquiries concerning the claims of Otho G. Bell, Lewie W. Griggs, and William A. Cowart.

"I have been advised that the following determinations have been made regarding the status of all United States Army Voluntary Non-

petitioners' claims upon this ground, the Army was apparently relying upon a statute enacted in 1939 which made it unlawful to pay from funds appropriated by any Act of Congress the compensation of "any person employed in any capacity by any agency of the Federal Government" who was a member of "any political party or organ-

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Repatriates who elected not to accept repatriation to United States control under the terms of the Korean Armistice Agreement prior to 23 January 1954:

"a. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954, under the terms of the Korean Armistice Agreement have, as demonstrated by their refusal to elect repatriation to the United States and their records as prisoners of war, adopted, adhered to or supported the aims of Communism, one of which is the overthrow of all non-Communist governments, including the Government of the United States, by force or violence.

"b. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954 under the terms of the Korean Armistice Agreement now advocate, or are members of an organization which advocates, the overthrow of the United States Government by force or violence.

"c. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954 under the terms of the Korean Armistice Agreement advocated, or were members of an organization which advocated, during the period from the date of their capture in Korea through the date of their Dishonorable Discharge from the Army, the overthrow of the United States Government by force or violence.

"d. That such persons are not entitled to the payment of salary or wages for the period beginning with their respective dates of capture through the date they were given Dishonorable Discharges.

"The claims of Otho G. Bell, Lewie W. Griggs, and William A. Cowart may not, therefore, be favorably considered.

"Sincerely yours,

[Signed] "H. W. Crandall
"Major General, USA
"Chief of Finance."

ization which advocates the overthrow of our constitutional form of government in the United States."[6] That this statute was the basis of the Army's decision is evident not only in the language employed in rejecting the petitioners' demands, but also in the pleadings filed in the Court of Claims.[7] We need not, however, now decide the applicability of this statute to members of the Armed Forces, for the reason that the statute was repealed more than a year before the Army relied upon it in refusing to pay the petitioners.[8]

Although this was the only ground ever advanced for the administrative denial of the petitioners' claims, the Government's brief in this Court, for understandable reasons, does not even mention this repealed statute. Instead, the Government now relies upon other grounds to avoid the provisions of 37 U. S. C. § 242. It says that the petitioners violated their obligation of faithful serv-

[6] "(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

"(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person." § 9A, 53 Stat. 1148.

[7] The "Second Affirmative Defense" read in part as follows:

"During the period for which they seek to recover pay and allowances herein, plaintiffs advocated the overthrow of the Government of the United States or were members of a political party or organization which so advocated. Therefore, plaintiffs are not entitled to recover under the provisions of Section 9A of the Act of August 2, 1939 (53 Stat. 1148), as amended."

[8] August 9, 1955, c. 690, § 4 (2), 69 Stat. 625.

ice,' and points to the principle of contract law that 'one who wilfully commits a material breach of a contract can recover nothing under it. 4 Williston, *Contracts* (1936 ed.) § 1022, pp. 2823–4; 5 Williston, *Contracts* (1936 ed.) § 1477; 5 Corbin, *Contracts* (1951 ed.) § 1127, pp. 564–5, see also *Restatement Contracts*, § 357 (1)(a)."

In accord with this principle, the Government argues that in the Missing Persons Act,[10] a statute first enacted in 1942,[11] Congress provided a statutory basis for denying the petitioners' claims. We do not so construe that statute.

Preliminarily, it is to be observed that common-law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon statutory right. In the Armed Forces, as everywhere else, there are good men and rascals, courageous men and cowards, honest men and cheats. If a soldier's conduct falls below a specified level he is subject to discipline, and his punishment may include the forfeiture of future but not of accrued pay.[12] But a soldier who has not received such a punishment from a duly constituted court-martial is entitled to the statutory pay and allowances of his grade and status, however ignoble a soldier he may be.[13]

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[9] "I, ..., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice." 10 U. S. C. § 501.

[10] 50 U. S. C. App. § 1001 *et seq.*

[11] 56 Stat. 143.

[12] See Article 57, Uniform Code of Military Justice, 10 U. S. C. § 857.

[13] Unless he is absent without leave or a deserter. *United States* v. *Landers*, 92 U. S. 77; *Dodge* v. *United States*, 33 Ct. Cl. 28; Dig. Ops. JAG Army 265 (1868); Dig. Ops. JAG Army 850 (1912).

This basic principle has always been recognized. It has been reflected throughout our history in numerous court decisions and in the opinions of Attorneys General and Judge Advocates General. "Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. . . . By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged." *In re Grimley*, 137 U. S. 147, 151, 152.

Almost a hundred years ago Attorney General Hoar rendered an opinion to the Secretary of War regarding the right to pay of a Major Herod, who had been "charged with murder, arrested, tried by a court-martial and sentenced to be hung." The Attorney General stated:

> "It was not expressly a part of the sentence that Herod should forfeit his pay from the date of his arrest, and I know of no statute imposing a forfeiture of pay from the date of arrest in a case like this of Herod's. The sentence that he be hung necessarily implied a dismissal from the service, but not, as it seems to me, the forfeiture of back pay. I can find no authority for the opinion of the Comptroller that, as Herod was withdrawn from actual military service by his arrest made on account of a crime committed by him, on the general principle that pay follows services; he should not be paid for

JAGA 1952/5875, 2 Dig Ops SENT & PUN § 357; JAGA 1953/1074, 3 Dig Ops PAY § 21.15; Davis, Military Laws of the United States, p. 471, n. 2 (1897); Winthrop, Military Law and Precedents, pp. 645–646 (2d ed. 1920). But see, Comment, Mil. L. Rev.; July 1959 (DA Pam 27-100-9, 1 Jul 60), p. 151. And see generally U. S. Army Special Text 27-157, Military Affairs (1955), pp. 1605–1612.

> the time he was under arrest. The monthly pay of officers of the Army is prescribed by statute, and so long as a person is an officer of the Army he is entitled to receive the pay belonging to the office, unless he has forfeited it in accordance with the provisions of law, whether he has actually performed military service or not." 13 Op. Atty. Gen. 103, 104.

A similar opinion was rendered by Attorney General Alphonso Taft a few years later. He rejected the theory of the Second Comptroller of the Treasury that "[i]f the man, by his misconduct and necessary withdrawal from service, does not perform his part of the contract, the Government cannot be held to the fulfillment of its part thereof." The Attorney General said:

> "The Comptroller has, I think, misconceived the true basis of the right to [military] pay. . . . In the naval, as in the military service, the right to compensation does not depend upon, nor is it controlled by, 'general principles of law'; it rests upon, and is governed by, certain statutory provisions or regulations made in pursuance thereof, which specially apply to such service. These fix the pay to which officers and men belonging to the Navy are entitled; and the rule to be deduced therefrom is that both officers and men become entitled to the pay thus fixed so long as they remain in the Navy, whether they *actually* perform service or not; unless their right thereto is forfeited or lost in some one of the modes prescribed in the provisions or regulations adverted to." 15 Op. Atty. Gen. 175, 176.

This principle has received consistent recognition in the Court of Claims. "It would, we think, be an anomalous proceeding to permit resort to the courts to ascertain whether, under all the various provisions with respect to pay and allowances of officers and men of the Army, Navy, and Marine Corps, investigations should obtain

to determine as a matter of fact whether the soldier involved had by conscientious service earned what the statutes allow him." *White* v. *United States*, 72 Ct. Cl. 459, 468. "[T]he mere fact that an officer or soldier is under charges does not deprive him of his pay and allowances. . . . such forfeiture can only be imposed by the sentence of a lawful court-martial." *Walsh* v. *United States*, 43 Ct. Cl. 225, 231.[14]

The statute upon which the petitioners rely applies this same principle to a specialized situation. A serviceman captured by the enemy and thus unable to perform his normal duties is nonetheless entitled to his pay. The rule has commanded unquestioned adherence throughout our history, as two cases will suffice to illustrate.

In 1807 a sailor named John Straughan was a member of the crew of the American frigate *Chesapeake*. After that vessel's ill-starred engagement with the British man-of-war *Leopard* off Hampton Roads, Straughan was taken aboard the *Leopard* and impressed into service in the British Navy. There he served for five years and nine days before he finally was repatriated. Years later his widow sued for his pay and rations as a member of the United States Navy during the period he had been held by the British. The Court of Claims ruled that, even though we had not been at war in 1807, the *Chesapeake* had nevertheless "been taken by an enemy," and that Straughan's widow was entitled to the United States Navy pay and allowances that had accrued while he was serving

[14] See *Conrad* v. *United States*, 32 Ct. Cl. 139; *Carrington* v. *United States*, 46 Ct. Cl. 279. See also Dig. Ops. JAG Army 265 (1868); Dig. Ops. JAG Army 850 (1912). The rule cuts both ways, as the case of *Ward* v. *United States*, 158 F. 2d 499, illustrates. There the plaintiff, a yeoman in the Navy, had actually performed the duties of a land title attorney. He sued to recover the reasonable value of his services, less what he had received as a yeoman. The Court of Appeals approved a dismissal of the complaint, with the comment that "[h]is rating fixed his status and his pay." 158 F. 2d, at 502.

with the British. *Straughan* v. *United States*, 1 Ct. Cl. 324.[15]

In October, 1863, a lieutenant in the Union Army named Henry Jones was taken prisoner by Confederate guerrillas near Elk Run, Virginia. Jones was confined in Libby Prison until March 1, 1865, when he was exchanged and returned to the Union lines. Upon his return he found that he had been administratively dismissed from the service in November, 1863, because he had been in disobedience of orders at the time of his capture. When the Army for that reason refused his demand for pay and allowances, he filed suit in the Court of Claims. The court entered judgment in his favor, stating that "[t]he contrary would be to hold that an executive department could annul and defy an act of Congress at its pleasure." *Jones* v. *United States*, 4 Ct. Cl. 197, 203.

It is against this background that we turn to the Government's contention that the Missing Persons Act authorized the Army to refuse to pay the petitioners their statutory pay and allowances in this case. The provisions of the Act which the Government deems pertinent are set out in the margin.[16] Originally enacted in 1942 as

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[15] The case was decided under a statute specifically applicable to naval personnel, originally enacted in 1800, 2 Stat. 45, now 37 U. S. C. § 244. See n. 32, *infra*.

[16] "§ 1001. Definitions

"For the purpose of this Act [sections 1001–1012 and 1013–1016 of this Appendix]—

"(b) the term 'active service' means active service in the Army, Navy, Marine Corps, and Coast Guard of the United States, including active Federal service performed by personnel of the retired and reserve components of these forces, the Coast and Geodetic Survey, the Public Health Service, and active Federal service performed by the civilian officers and employees defined in paragraph 1(a) (3) above;" 50 U. S. C. App. § 1001. [*Note 16 continued on pp. 13, 14.*]

temporary legislation,[17] the Act was amended and re-enacted several times,[18] and finally was made permanent in 1957.[19] So far as relevant here, this legislation pro-

"§ 1002. Missing, interned, or captive persons. (a) Continuance of pay and allowances.

"Any person who is in the active service . . . and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or besieged by a hostile force shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same . . . pay [and allowances] . . . to which he was entitled at the beginning of such period of absence or may become entitled thereafter . . . and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]. Such entitlement to pay and allowances shall not terminate upon the expiration of a term of service during absence and, in case of death during absence, shall not terminate earlier than the dates herein prescribed. There shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period. . . . 50 U. S. C. App. § 1002.

"§ 1009. Determinations by department heads or designees; conclusiveness relative to status of personnel, payments, or death.

"(a) The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001–1012 and 1013–1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. . . . Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act [sections 1001–1012 and 1013–1016 of this Appendix], to

[*Notes 17–19 are on p. 14.*]

vides that any person in active service in the Army "who is officially determined to be absent in a status of . . . captured by a hostile force" is entitled to pay and allowances; that "[t]here shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority;" that the Secretary of the Army or his designated subordinate shall have authority to make all determinations necessary in the administration of the Act, and for purposes of the Act determinations so made as to any status dealt with by the Act shall be conclusive.

We are asked first to hold that "[s]ince the Missing Persons Act is later in time, is comprehensive in scope, and includes within its provisions the whole subject matter of R. S. 1288 [the statute upon which the petitioners rely], any inconsistency or repugnancy between the two statutes should be resolved in favor of the Missing Persons Act." This step having been taken, we are asked to decide that the petitioners, because of their behavior after their capture, were no longer in the "active service in the Army . . . of the United States," and that they were therefore not covered by the Act. It is also sug-

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pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: . . . When circumstances warrant reconsideration of any determination authorized to be made by this Act [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. . . ." 50 U. S. C. App. § 1009.

[17] Act of March 7, 1942, 56 Stat. 143.

[18] Act of December 24, 1942, 56 Stat. 1092; Act of July 1, 1944, 58 Stat. 679; § 4 (e) of Selective Service Act of 1948, 62 Stat. 608; Act of July 3, 1952, 66 Stat. 330, 331; Act of April 4, 1953, 67 Stat. 20-21; Act of January 30, 1954, 68 Stat. 7; Act of June 30, 1955, 69 Stat. 238; Act of July 20, 1956, 70 Stat. 595; Act of August 7, 1957, 71 Stat. 341.

[19] Act of August 29, 1957, 71 Stat. 491.

gested, alternatively, that the Secretary of the Army might have determined that each of the petitioners after capture was "absent from his post of duty without authority," and, therefore, not entitled to pay and allowances under the Act. We can find no support for these contentions in the language of the statute, in its legislative history, or in the Secretary's administrative determination.

The Missing Persons Act was a response to unprecedented personnel problems experienced by the Armed Forces in the early months after our entry into the Second World War. Originally proposed by the Navy Department, the legislation was amended on the floor of the House to cover the other services. As the Committee Reports make clear, the primary purpose of the legislation was to alleviate financial hardship suffered by the dependents of servicemen reported as missing.[20]

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[20] "In general, the purposes of this bill are to provide authorization for the continued payment or credit in the accounts of the pay and allowances of missing persons for a year following the date of commencement of absence from their posts of duty or until such persons have been officially declared dead [In December, 1942, the statute was amended so as to permit a department head to continue personnel in a missing status for an indefinite period. 56 Stat. 1092]; the continued payment for the same period of the allotments for the support of dependents and for the payment of insurance premiums, and for regular monthly payments to the dependents of missing persons, in the same manner in which allotments are paid, in those instances in which the missing persons had neglected to provide for their dependents through the medium of allotments, such payments to be deducted from the pay of the missing persons in the same manner in which allotments are paid.

"The Navy Department advised the committee that many instances have occurred during recent months of personnel having been reported as missing, and in accordance with requests received from disbursing officers carrying the pay accounts, the allotments of such persons were discontinued. Because of stoppage of allotments and

To hold that the Missing Persons Act operated to repeal the statute upon which the petitioners rely would be a long step to take, for at least two reasons. In the first place, the record of the hearings of the Senate Committee on Naval Affairs clearly discloses that at the time the Missing Persons Act was being considered, the Committee was made fully aware of the 1814 statute, and manifested no inclination to disturb it.[21] Secondly, it is not entirely accurate to say, as does the Government, that the Missing Persons Act is "later in time." After the original passage of that Act in 1942, the statute upon which the petitioners rely was recodified in 1952 and again in 1958.[22]

But the question whether there was a repeal by implication is one that we need not determine here, for it is clear that under either statute the petitioners are entitled to the pay and allowances that accrued during their detention as prisoners of war. The Missing Persons Act

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the withholding of pay of missing persons, dependents of personnel concerned have experienced great hardships in a large number of cases. The committee are advised that this situation is aggravated by the fact that, so long as a person is declared to be missing and has not been officially declared dead, the 6 months' death gratuity is not payable." H. R. Rep. No. 1680, 77th Cong., 2d Sess., pp. 3, 5.

[21] The Committee was advised by a representative of the Marine Corps as follows: "Section 1288, Revised Statutes (sec. 846, title 10, U. S. Code), provides that noncommissioned officers and privates shall be entitled to receive during their captivity by an enemy, notwithstanding the expiration of their terms of service, the same pay, subsistence, and allowances to which they may be entitled while in the actual service of the United States. This applies only to enlisted personnel, and I know of no such law affecting the pay and allowances of officers and nurses. The proposed legislation would also authorize the crediting, in the account of the individual concerned, of the same pay and allowances received at the time an individual is reported as missing or missing in action until his status is determined by competent authority." Hearings before the Senate Committee on Naval Affairs on H. R. 6446, 77th Cong., 2d Sess., pp. 13-14.

[22] See note 4.

unambiguously provides that any person "in the active service . . . officially determined to be absent in a status of . . . captured by a hostile force . . . [is] entitled to receive or to have credited to his account the same . . . pay [and allowances] to which he was entitled at the beginning of such period of absence. . . ." It affirmatively appears on this record that the petitioners were in the active service of the Army, that they were in fact captured by the enemy, and that they were later officially determined to be "absent in a status of . . . captured by a hostile force." The terms of the Missing Persons Act are therefore expressly applicable.

The argument that it was open to the Secretary of the Army to determine that the petitioners in the prison camps to which they were taken were thereafter "not in the active service" cannot survive even cursory analysis. In the Armed Forces the term "active service" has a precise meaning, a meaning not dependent upon individual conduct. 10 U. S. C. § 101.[23] Moreover, the verbal structure of the Act, re-enforced by common sense, clearly leads to the conclusion that "active service" refers to a person's status at the time he became missing. Nothing in the legislative history of the original statute or of its many re-enactments offers support for any other construction. That history simply reflects a continuing pur-

[23] A House Committee Report concerning a proposed amendment to the Act sets forth a letter from the Secretary of the Army clearly showing his understanding that "active service" was employed in the statute as a technical phrase embodying a technical status: "Also, the proposal would amend section 2 of the Missing Persons Act to provide coverage for persons on training duty under certain conditions, in addition to persons on active service." H. R. Rep. No. 2535, 84th Cong., 2d Sess., p. 7. See also H. R. Rep. No. 204, 85th Cong., 1st Sess., p. 8; H. R. Rep. No. 888, 85th Cong., 1st Sess., p. 3; H. R. Rep. No. 2354, 84th Cong., 2d Sess., p. 3; S. Rep. No. 573, 85th Cong., 1st Sess., p. 4; S. Rep. No. 970, 85th Cong., 1st Sess., p. 7; S. Rep. No. 2552, 84th Cong., 2d Sess., p. 3.

pose to widen the classes of persons to whom the benefactions of the law were to be extended, from the time those persons became missing.[24]

The Government's alternative argument seems, as a matter of statutory construction, equally invalid. The legislative history discloses that the provision denying pay to a person officially determined to have been "absent from his post of duty without authority" was enacted to cover the case of a person found to have been "missing"

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[24] For example, when the statute was amended in 1957 to extend coverage to those in "full-time duty training, other full-time duty, or inactive duty training," an Army spokesman testifying before the House Subcommittee expressed the clear view that "active service" referred to the moment the person entered a missing status. "The purpose of that . . . is to insure that people who are in a nonpay status at the time they enter in a missing or missing-in-action status are covered. . . . Under the present wording of the bill it is conceivable that being in a nonpay status at the time that he enters into a missing status his survivors would not be entitled to any pay or allowances. This would insure that they would be entitled to the pay and allowances that he would have had, had he been on active duty at the time that he entered into a missing status." Hearings before Subcommittee No. 1 of the House Committee on Armed Services on H. R. 2404, 85th Cong., 1st Sess., p. 563.

In S. Rep. No. 970, 85th Cong., 1st Sess., the Committee on Armed Services stated: "Coverage would be extended to members of the Reserve components while they are performing full-time training duty, other full-time duty, and inactive duty training with or without pay. Members of the Reserve components entering a missing status while performing duty of the types enumerated would have credited to their pay accounts the same pay and allowances that they would receive if they were performing full-time active duty. Some reservists participate in training without pay, such as weekend proficiency flights in aircraft, and this amendment is intended to treat them as if they were on active duty when they entered a missing status." P. 3. Similar statements may be found in H. R. Rep. No. 2535, 84th Cong., 2d Sess., p. 3, and H. R. Rep. No. 204, 85th Cong., 1st Sess., p. 2. Certainly the thrust of these statements is a primary concern with status at the time the missing status is first entered.

in the first place only by reason of such unauthorized absence.[25] Moreover, desertion and absence without leave are technically defined offenses. 10 U. S. C. § 885, 10 U. S. C. § 886; see Manual for Courts-Martial, United States, p. 315 (1951). It is open to serious question whether the conduct of the petitioners after their capture could conceivably have been determined to be tantamount either to desertion or absence without leave. See Axins, Law of AWOL, p. 167 (1957); Snedeker, Military Justice under the Uniform Code, p. 562 (1953).

These are questions which we need not, however, pursue. We need not decide in this case that the Secretary of the Army was wholly without power under the statute to determine administratively that the petitioners after their capture were no longer in active service, or that they were absent from their posts of duty. Nor need we finally decide whether either such determination by the Secretary would have been valid as a matter of law. The simple fact is that no such administrative determination has ever been made. The only reason the Army ever advanced for refusing to pay the petitioners was its determination that they had "advocated, or were members of an organization which advocated, . . . the overthrow of the United States Government by force or violence."[26] That determination has now been totally abandoned. The Army has never even purported to determine that the petitioners were not in active service or that they were absent from their posts of duty.[27] The Army cannot rely upon something that never happened, upon an adminis-

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[25] See H. R. Rep. No. 1680, 77th Cong., 2d Sess., p. 5; Hearings before House Committee on Naval Affairs on H. R. 4405, 78th Cong., 2d Sess., p. 2316.

[26] See note 5, *supra*.

[27] Nor has the Army ever purported to determine that the petitioners were not in "captivity" or "in the actual service of the United States" within the meaning of 37 U. S. C. § 242.

trative determination that was never made, even if it be assumed that such a determination would have been permissible under the statute and supported by the facts.[28]

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[28] The record of a 1954 hearing before the House Armed Services Committee on a bill to extend the life of the Missing Persons Act indicates that some thought was being given at that time to the possibility of an administrative determination that the petitioners were absent from their posts of duty:

"Mr. Bates. General, what is the pay status of prisoners who have refused repatriation?

"General Powell. Those prisoners, sir, are carried in pay status. In negotiating the armistice we agreed that until this matter was settled they would be carried as prisoners of war.

"Mr. Kilday. When does that stop?

"Mr. Bates. Does that stop next week?

"General Powell. The method of stopping the pay and allowances, allotments and status of military personnel of those 21 prisoners is a matter to be decided by the Secretary of Defense for all services involved. He has announced no decision.

"Mr. Bates. Aren't they absent without leave?

"General Powell. No, sir.

"Mr. Bates. What is it?

"General Powell. In the armistice agreement, the United States agreed to carry them as prisoners of war until the matter was settled.

"Mr. Bates. I thought there was also an understanding that they would be considered a. w. o. l. as of a certain date?

"General Powell. That is a matter still to be decided by the Secretary of Defense.

"Mr. Bates. Or deserters, you know.

"General Powell. The Secretary of Defense is deciding for all services.

"The Chairman. Call the roll. It is not necessary to call the roll. There is no objection, is there?

"(Chorus of 'No.')

"Mr. Kilday. I would like it understood that they are going to be cut off as soon as you can.

"General Powell. Sir, the Secretary of Defense must make a decision, including phychological [*sic*] factors, individual rights, the law involved, and national policy.

"Mr. Vinson. That is right. [*Note 28 continued on p. 21.*]

See *Service* v. *Dulles*, 354 U. S. 363; *Vitarelli* v. *Seaton*, 359 U. S. 535. For these reasons we hold that the petitioners were entitled under the applicable statutes to the pay and allowances that accrued during their detention as prisoners of war.

Throughout these proceedings no distinction has been made between the petitioners' pay rights while they were prisoners and their rights after the Korean Armistice when they voluntarily declined repatriation and went to Communist China. Since both the Army and the Court of Claims denied the petitioners' claims entirely, no separate consideration was given to the petitioners' status after their release as prisoners of war until the date of their administrative discharges. Nor did the petitioners in this Court address themselves to the question of the

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"General Powell. He has not as yet announced such a decision to us.

"Mr. Cunningham. Should the pay and allotments, benefits to the members of the family, ever be cut off?

"The Chairman. Sure.

"Mr. Van Zandt. Oh, yes.

"Mr. Cunningham. Why so? They are not to blame for this.

"Mr. Bishop. No, they are not.

"Mr. Vinson. Well, if a man is absent without leave—

"Mr. Cunningham. A man has children or wife and he is over there in Korea and decided to stay with the Communists. Why should the children be punished?

"The Chairman. Wait, one at a time. The reporter can't get it.

"Mr. Cunningham. I think it is a good question. The pay for the individual: he should never have that, and his citizenship. But here is a woman from Minnesota, goes over there and pleads with her son and went as far as Tokyo. Now that mother needs an allotment as that boy's dependent. Why should she be punished because the boy stayed over there? I think there are a lot of things to be considered; not just emotion.

"Mr. Kilday. That is inherent. When a man is court-martialed—

"The Chairman. Without objection, the bill is favorably reported." Hearings before House Committee on Armed Services on H. R. 7209, 83d Cong., 2d Sess., pp. 3071–3072.

petitioners' rights to pay during that interval. Yet, it is evident that the petitioners' status during that period might be governed by considerations different from those which have been discussed. Other statutory provisions and regulations would come into play. Accordingly we express no view as to the petitioners' pay rights for the period between the Korean Armistice and their administrative discharges, leaving that question to be fully canvassed in the Court of Claims, to which in any event this case must be remanded for computation of the judgments.

The disclosure of grave misconduct by numbers of servicemen captured in Korea was a sad aftermath of the hostilities there. The consternation and self-searching which followed upon that disclosure are still fresh in the memories of many thoughtful Americans.[29] The problem is not a new one.[30] Whether the solution to it lies alone in subsequent prosecution and punishment is not for us to inquire.[31] Congress may someday provide that mem-

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[29] See Report by the Secretary of Defense's Advisory Committee on Prisoners of War (1955).

[30] In 1333 John Culwin was charged with having sworn allegiance to his Scottish captors. 1 Hale, Historia Placitorum Coronae 167–168 (1736). The earliest reported American case of prisoner of war misconduct appears to be *Respublica* v. *McCarty*, 2 Dall. 86 (Supreme Court of Pennsylvania, 1781). During the Civil War thousands of captives on each side defected to the enemy. See H. R. Rep. No. 45, 40th Cong., 3d Sess., pp. 223, 742–777 (1869). Report by the Secretary of Defense's Advisory Committee on Prisoners of War p. 51 (1955). Two treason trials grew out of prisoner of war misconduct during World War II. *United States* v. *Provoo*, 124 F. Supp. 185, rev'd. 215 F. 2d 531, aff'd. 350 U. S. 857. *United States ex rel. Hirshberg* v. *Malonaphy*, 73 F. Supp. 990, rev'd. 168 F. 2d 503, rev'd *sub nom. United States ex rel. Hirshberg* v. *Cooke*, 336 U. S. 210. More than forty British prisoners of war were brought to trial for misconduct. See note, 56 Col. L. Rev. 709, 721 (1956).

[31] Upon their return to the United States in July 1955, the petitioners were confined by the United States Army in San Francisco, California, to await trial by general court-martial for violation of

bers of the Army who fail to live up to a specified code of conduct as prisoners of war shall forfeit their pay and allowances. Today we hold only that the Army did not lawfully impose that sanction in this case.

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Article 104 of the Uniform Code of Military Justice. In November of that year they were released from confinement by virtue of writs of habeas corpus issued by a Federal District Court on the authority of *Toth* v. *Quarles*, 350 U. S. 11. There have been several court-martial prosecutions growing out of alleged misconduct by Army prisoners of war in Korea. See *United States* v. *Dickenson*, 17 C. M. R. 438, 20 C. M. R. 154; *United States* v. *Flood*, 18 C. M. R. 362; *United States* v. *Batchelor*, 19 C. M. R. 452, 22 C. M. R. 144; *United States* v. *Olson*, 20 C. M. R. 401, 22 C. M. R. 250; *United States* v. *Gallagher*, 21 C. M. R. 445; *United States* v. *Rader*, 22 C. M. R. 487; *United States* v. *Allen*, 25 C. M. R. 60; *United States* v. *Fleming*, 19 C. M. R. 438. See the discussion of these cases in Prugh, Justice for All: REDCAP-K, Army Combat Forces Journal, November 1955, p. 15. Note, 56 Col. L. Rev. 700.

A statute relating to the right to pay of members of the United States Navy who are taken prisoner does appear to require a showing of conduct after capture:

"The pay and emoluments of the officers and men of any vessel of the United States taken by an enemy who shall appear, by the sentence of a court-martial or otherwise, to have done their utmost to preserve and defend their vessel, and, after the taking thereof, to have behaved themselves agreeably to the discipline of the Navy, shall go on and be paid to them, until their exchange, discharge, or death." 37 U. S. C. § 244.

No reported case has been found holding that this standard of conduct was not met. Cf. *Straughan* v. *United States*, 119 Ct. Cl. 624, discussed in text, *supra*, p. —.